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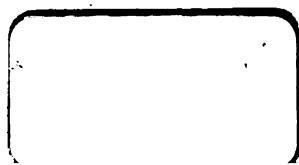
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THE  
HOUSE OF LORDS CASES

ON  
APPEALS AND WRITS OF ERROR,  
AND CLAIMS OF PEERAGE,

DURING THE SESSIONS  
1850, 1851, AND 1852.

BY CHARLES CLARK, Esq.,  
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

BY APPOINTMENT OF THE HOUSE OF LORDS.

VOL. III.

BOSTON:  
LITTLE, BROWN, AND COMPANY.  
1870.



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# JUDGES AND LAW OFFICERS

DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS  
VOLUME.

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## MEMORANDA.

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IN the Vacation after Trinity Term, 1850, Sir Lancelot Shadwell, Vice-Chancellor of England, died, and Baron Rolfe was appointed Vice-Chancellor, and created a peer by the title of Baron Cranworth, of Cranworth, in the county of Norfolk.

In the Vacation after Hilary Term, 1851, Lord Langdale, the Master of the Rolls, died, and in March, 1851, Sir John Romilly, then Attorney-General, was appointed to the vacant office. Sir A. J. E. Cockburn, Solicitor-General, was appointed Attorney-General, and William Page Wood, Esq., one of her Majesty's Counsel, was appointed Solicitor-General, and was afterwards knighted.

In the Vacation after Trinity Term, 1851, Vice-Chancellor Knight Bruce and Lord Cranworth were appointed Lords Justices in the Court of Chancery.

About the same time George James Turner, Esq., Richard Torin Kindersley, Esq., and James Parker, Esq., all of whom were of her Majesty's Counsel, were appointed Vice-Chancellors, and afterwards received the honour of knighthood.

In the month of February, 1852, Lord Truro resigned the Great Seal, which was thereupon delivered to the Right Hon. Sir Edward Burtenshaw Sugden, on which occasion he was created a peer by the title of Baron St. Leonards, of Slaugham, in the county of Sussex.

Sir Alexander Cockburn and Sir W. Page Wood at the same time resigned their respective offices of Attorney-General and Solicitor-General, in which they were succeeded by Sir Frederic Thesiger and Sir Fitzroy Kelly.

In the Vacation after Trinity Term, 1852, Sir James Parker, one of the Vice-Chancellors, died, and John Stuart, Esq., one of her Majesty's Counsel, was appointed a Vice-Chancellor in his stead. He was afterwards knighted.

In the Vacation after Michaelmas Term, 1852, Lord St. Leonards resigned the Great Seal, which was thereupon delivered to the Right Hon. Lord Cranworth, one of the Lords Justices. His Lordship was succeeded as one of the Lords Justices by the Right Hon. Sir George James Turner, one of the Vice-Chancellors.

Sir F. Thesiger and Sir F. Kelly also, at the same time, resigned their offices of Attorney-General and Solicitor-General, and Sir A. E. Cockburn

and Sir W. P. Wood were reappointed to those offices. In Hilary Term, 1853, Sir W. Page Wood was appointed a Vice-Chancellor, in the room of Sir G. J. Turner; and Richard Bethell, Esq., was appointed Solicitor-General, and was afterwards knighted.

In the Vacation after Hilary Term, 1852, the Right Hon. Maziere Brady resigned the Great Seal of Ireland, and the Right Hon. Francis Blackburne, Lord Chief Justice of the Court of Queen's Bench in Ireland, was appointed his successor.

In February, 1852, John Hatchell, Esq., Attorney-General, and Henry George Hughes, Esq., Solicitor-General for Ireland, resigned their respective offices, and were succeeded by Joseph Napier, Esq., and James Whiteside, Esq.

In December, 1852, Lord Chancellor Blackburne resigned the Great Seal of Ireland, which was again delivered to the Right Hon. Maziere Brady.

In December, 1852, Mr. Napier and Mr. Whiteside resigned their respective offices, and were succeeded by J. Brewster, Esq., as Attorney-General, and W. Keogh, Esq., as Solicitor-General.

In April, 1851, Mr. Rutherford, the Lord Advocate of Scotland, becoming a Lord of Session, was succeeded in his office by James Moncreiff, Esq., the Solicitor-General for Scotland.

In February, 1852, Mr. Moncreiff resigned the office of Lord Advocate of Scotland, which was thereupon conferred on John Inglis, Esq.

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# CASES

## IN THE

# HOUSE OF LORDS.

---

BAIN v. WHITEHAVEN AND FURNESS JUNCTION RAILWAY CO.

1850. June 11, 14, 18, 21.

JOHN BAIN, . . . . .	<i>Appellant.</i>
The PROPRIETORS of the WHITEHAVEN AND FURNESS JUNCTION RAILWAY COMPANY and FORBES, . . . . .	} <i>Respondents.</i>

*Bill of Exceptions. Evidence. Foreign Law. Railway Companies' Books. Shareholders.*

Evidence of foreign law was tendered on the trial of an issue before a jury. It was objected to, on the ground that as the issue did not, in terms, raise any question of foreign law, the evidence was a surprise on the party against whom it was produced. The evidence was admitted, and the objection of surprise was put on the record as one of the heads of a bill of exceptions. The evidence was really inadmissible, on the ground that the *lex fori* was that by which alone the issue could be decided; but no notice of this ground of objection was taken in the bill of exceptions:—

*Held*, that the Court of Error could not look beyond the bill of exceptions, but must decide on that alone, and that the objection of surprise was not sufficient to exclude the evidence.

The law of the country where a contract is to be enforced, not that of the country in which it is made, governs the question of admissibility of evidence on a trial arising out of such contract.

The Companies Clauses Consolidation Act for Scotland (8 & 9 Vict. c. 17, § 9) requires, in the same terms as the English statute of that name, a book to be kept, containing, in alphabetical order, "the names of the shareholders," with the number of the shares to which such shareholders shall be respectively entitled, distinguishing each share by its \* number, and the amount \* 2 of the subscriptions paid on such shares." The 29th section of the statute





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makes such book *primâ facie* evidence of a person being a shareholder, and of the number and amount of his shares.

*Held*, first, that as this was an exceptional privilege in favor of the company, the provisions of the statute with respect to the mode of keeping the book must be strictly complied with; and, secondly, that an entry in the book, describing A. as possessed of a certain number of shares, numbered from one given number to another given number, and stating a gross amount as paid upon these shares, was a sufficient compliance with those provisions, so as to render the book admissible in evidence.

The statute requires that a book, to be called "The Register of Shareholders" shall be kept. The book actually kept was marked "Register of Proprietors." *Held*, that this variation in the title did not prevent it from being given in evidence.

An exception, abandoned in the Court below, was allowed to be argued here.<sup>1</sup>

THIS was an appeal against a judgment of the Court of Session, in a cause in which two actions, brought by the respondent against the appellant, had been conjoined by order of the Court.

The sums sought to be recovered in these actions were the following: A sum of 1130*l.*, being the third call of 2*l.* per share on five hundred and sixty-five shares, with interest from the 24th May, 1847; a sum of 565*l.*, being the first instalment of the fourth call of 1*l.* per share, with interest from the 22d of November, 1847; a like sum, being the second instalment of the fourth call, with interest from the 15th of January, 1848; a like sum, being the third instalment of the fourth call, with interest from the 15th of March, 1848; a sum of 1130*l.*, being the fifth call, with interest from the 10th of July, 1848; and a sum of \* 3 565*l.*, being the \*sixth call of 1*l.* per share, with interest from the 12th December, 1848. Bain pleaded that he was

not a shareholder of the company, that the calls were not legally or validly made by the directors, or by any parties having sufficient authority to make the same; that no proper notice was given to him of the calls, and that the requisites of the general and special acts as to calls not having been observed, the pursuers were not entitled to recover. The Lords of the Second Division of the Court of Session adjusted in the following form the issue to be tried: "Whether the said John Bain was, at the dates of making the calls after mentioned, respectively, the holder of five

<sup>1</sup> See *M'Mahon v. Lennard*, 6 House of Lords Cases, at p. 986.

The case in the text was cited by the counsel for the plaintiffs in error in *The Mersey Docks Trustees v. Gibbs*, 11 House of Lords Cases, at p. 694, and Law Rep. 1 H. L. at p. 98.

hundred and sixty-five shares of the Whitehaven and Furness Junction Railway Company, and is indebted to the pursuers in the following sums, or any part thereof?" The calls were then set out in detail. The cause came on for trial on the 9th January, 1850, before the Lord Justice Clerk, and a jury, when in order to prove that Bain was a member of the company, and that the calls had been regularly made on him, a witness named John Meyer was put into the box. The counsel for Bain, before allowing Meyer to give evidence in the cause, examined him *in initialibus*, or, as it is called here, on the *voire dire*, when he deposed that he was not a shareholder; that he had sold his shares in the previous December, although the transfer had not then been entered in the transfer book; that it had been entered in the supplementary register of shareholders; that that supplementary register was a book of entries made between the period of one meeting of the company and another, and, before the next half-yearly meeting, would be fairly copied out into the register book, and would be then duly sealed, and that \*until that was done, \*4 his name would remain on the last sealed register, as was the case in all instances with transfers made in the intervals between one meeting and another. All his calls had been paid up. Upon this examination it was objected that John Meyer was not admissible as a witness, for that the transfer of his shares not being legally complete, he was still a partner in the company, and consequently was not admissible as a witness against a person charged as likewise being a partner therein. The Lord Justice Clerk, however, admitted the witness, and against his decision on that matter the first exception was presented. On the argument of these exceptions in the Inner House, this one was abandoned, but it was re-stated on the appeal here.

A book, marked on the back and in the body of the book, "The Register of Proprietors," was then tendered in evidence. It was produced as the Sealed Register of the shareholders of the company. It was objected to on the ground that it was entitled "Register of Proprietors," and not "Register of Shareholders," the latter being the title given in the Scotch Companies Clauses Consolidation Act (8 & 9 Vict. c. 17, § 9), to the book in which the shareholders were registered. The Lord Justice Clerk allowed the book to be received in evidence. This formed the ground of the second exception.

Several call letters addressed to Bain were then tendered in evidence, and were objected to on the ground that they were printed letters, and that the signature to each letter was also printed. To remove this objection the pursuers proposed to prove by the evidence of an English counsel that under the English

Companies Clauses Consolidation Act (8 & 9 Vict. c. 16)

\*5 which was \* in almost exactly the same terms as the Scotch Act, the English Courts had allowed such letters to be given in evidence, either without any signature at all or with a printed signature. The counsel for Bain objected to this evidence of the English counsel, on the ground of surprise, because the English law was not averred or mentioned on the record. The Lord Justice Clerk overruled the objection of surprise, and admitted the evidence, and this formed the ground of the third exception.

The English counsel was accordingly examined; he proved that in England a notice of call need not be signed in writing. One of the resolutions of the directors made in April, 1847, but not signed till January, 1849, was also tendered in evidence, and admitted, on proof given that by the English law such signature was sufficient. To these pieces of evidence so admitted the defender's counsel tendered the fourth exception.

The following was the form of the extract from the "Register of Proprietors," sealed at the meeting of the company, on the 26th of February, 1849.

Register No.	Name.	Residence.	Description.	No. of shares.	Numbers.		Amount paid to Feb. 26, 1849.
					From	To	
320	Bain, John	Of Moriston, in Glasgow	Esq.	50	1,551	1,600	3,390
				25	8,470	8,494	
				20	8,765	8,784	
				7	11,974	11,980	
				5	12,031	12,035	
				8	12,046	12,053	
				10	12,064	12,073	
				20	12,299	12,318	
				50	15,319	15,368	
				20	13,484	13,053	
				100	13,374	13,473	
				250	13,514	13,763	

It was objected that this form of entry was not a compliance with the provisions of the Companies Clauses \* Con-

solidation Act (Scotland),<sup>1</sup> for that it did not distinguish each share by its number, or distinctly point out the total number of shares held by Bain, nor distinctly show the amount of subscriptions paid on such shares; but was a mere aggregate statement both of numbers and amounts.

The jury returned a verdict for the pursuers, and all the exceptions (save those which had been abandoned) having been argued and overruled in the Inner House, the case was now brought up by appeal. Several causes of error were assigned, but of these some related entirely to the forms of the administration of the law in the Scotch Courts, and are, therefore, not noticed in this report.<sup>2</sup>

*Mr. Turner* and *Mr. Anderson*, for the appellant, \* were \* 7 about to argue that Meyer was not admissible as a witness, when —

*Mr. Butt* (with whom was *Mr. McFarlane*) for the respondents, submitted, that as this objection had been given up in the Court below, it could not be received here.

*Mr. Turner* and *Mr. Anderson*. — An argument on that objection is admissible by the practice of this House. In *Burnes v. Pennell*,<sup>3</sup> and in *Luke v. The Magistrates of Edinburgh*,<sup>4</sup> such a course was permitted. In the former it was said that a particular objection ought to have been taken in the Court below, but it was allowed to be argued here, although it had not been so taken; and in the latter it was held that this House might decide on an objection

<sup>1</sup> 8 & 9 Vict. c. 17, § 9, by which it is enacted, “that the company shall keep a book to be called the ‘Register of Shareholders,’ and in such book shall be fairly and distinctly entered, from time to time, the names of the several corporations, and the names and additions of the several persons entitled to shares of the company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares, and the surnames or corporate names of the said shareholders shall be placed in alphabetical order; and such book shall be authenticated by the common seal of the Court being affixed thereto.”

The 29th section declares, that “the production of the register of shareholders shall be *primâ facie* evidence of such defender being a shareholder, and of the number and amount of his shares.”

<sup>2</sup> For a report of the case on those points, see 7 Bell's Appeal Cases, p. 79.

<sup>3</sup> 2 House of Lords Cases, 497, 507, 511, 516.

<sup>4</sup> 6 Wilson & Shaw, 241.

which was not pressed in the Court below, and although it had not formed part of the consideration for the judgment in that Court.

[The argument on this point was allowed to proceed *de bene*.]

Meyer ought not to have been admitted as a witness, for, in law, he still continued a party interested as a member of the company. Till this transfer of his shares had been completely made according to the provisions of the Companies Clauses Consolidation Act, it had no legal effect, as between him and the rest of the world. It might be a valid transfer under the 15 and 16 ss. of the statute, as between him and the transferee, but that could not affect the rights of third persons. Though, as between himself and the purchaser, the title to be registered as a shareholder in the  
 \*8 \* company might be transferred, still, if Meyer's liability to the company was not so completely cancelled but that he might be sued by the company, his interest continued to exist, and he was thereby incapacitated from being a witness.

Then as to the book which was tendered in evidence. It was not a book made in accordance with the provisions of the statute, which, on this subject, are imperative. It did not bear the name or title which the statute required it should bear, and it was not so made up as to enable the party making it up to produce it in evidence. The legislature has given to companies of this description a great privilege, in enabling them to produce their own books as evidence in their own behalf, and it has guarded this privilege from liability to the grossest abuse, by requiring certain things to be done before these books shall be admissible in evidence. These requirements of the statute must be strictly complied with, or the mischiefs they were intended to prevent will certainly happen. In *The Birkenhead Railway Company v. Brownrigg*,<sup>1</sup> the Court of Exchequer decided that the only register, which was by the statute made *prima facie* evidence against a shareholder, was a register duly prepared and sealed under the provisions of the statute, and, therefore, where the sealed register described the holders of shares to be "Brownrigg and other trustees," it was held to be no evidence against a co-trustee of Brownrigg. That was a stronger case than the present; for there all the names of the individual shareholders were fully set out in the alphabetical list or register from which the sealed register was made out. And this rule has been

<sup>1</sup> 4 Exch. Rep. 426; 19 Law Journal N. S. Exch. 27.

adopted \* from that which governs the construction of statutes \* 9 relating to orders of justices, namely, that the provisions of the statute must be strictly complied with. Thus, in *Davison v. Gill*,<sup>1</sup> an order of justices for stopping up a way was held to be invalid, because it did not strictly follow the form given by the Act of Parliament under which it professed to be made. To meet the objection founded on the words of the statute in this case, and warranted in principle by these authorities, there is nothing but a presumption as to the similar meaning of two distinct words. The Judges in the Court below assume that "proprietor" and "shareholder" mean the same thing, and that, consequently, though the statute says one word shall be used, the other may with equal propriety be employed. Such reasoning, even if correct, will not dispense with the positive words of a statute. But, in fact, the two words do not mean the same thing. A man may be in fact a proprietor of shares, without being legally a shareholder. He may be the proprietor of them in virtue of a purchase and a payment between himself and another man, and of a mere handing over of scrip certificates, but, until the transfer of the shares which those certificates represent has been legally completed, he is not the shareholder; for shareholder is a word of particular signification, and implies the possession of a certain character, which can not be conferred upon him but by the performance of all the conditions which the statute requires. A register of proprietors, therefore, does not mean the same thing as a register of shareholders, and even the interpretation clause, which says that "shareholder" shall mean "proprietor," does not say that "proprietor" shall \* mean "shareholder." It therefore es- \* 10 tablishes a distinction between them, and shows that one word has a larger and more comprehensive signification than the other. The book is wrongly entitled, and not being in accordance with the provisions of the statute, was improperly received in evidence.

But assuming that, so far as the title goes, the book might be received, then it is objectionable for not properly showing that the appellant was the proprietor of the 565 shares, in respect of the calls for which these actions were brought against him. It is defective in this respect, that it does not describe the shares by numbers, in the way required by the statute. It cannot be

<sup>1</sup> 1 East, 64.



doubted that, as to the description of the shares, the provisions of the statutes are mandatory. The legislature desired to afford to every one who might have to deal with shares in these public companies, the fullest protection, by enabling the title to every individual share to be traced, and its value to be ascertained. If that cannot be done, the object of the 38th and 39th clauses of the Act, which relate to executions to be issued against companies or their shareholders, might be defeated.

Then as to the admissibility of evidence of the English law. This evidence was not admissible ; for the remedy being enforced in the Courts in Scotland, the law of those Courts was to govern the enforcement of the remedy. *Yates v. Thomson*,<sup>1</sup> and *Don v. Lippmann*.<sup>2</sup> The rule laid down in those cases has been fully adopted by Story in his *Conflict of Laws*,<sup>3</sup> and in the English Courts is to be found a case of *Brown v. Thornton* <sup>4</sup> which proceeds on the same principle.

\* 11 \* [LORD BROUGHAM. — But the objection on the record is not that which you are now arguing. — it is merely an objection on the ground of surprise, for that the English law was not averred.]

That was so far as the examination of an English counsel, to prove the English law, was concerned. But the evidence of that law itself was inadmissible, and we, having objected to its admissibility, are not restricted to one mode of showing it to be inadmissible. Besides, here the admissibility of the evidence having been objected to on this ground, the other side insisted generally that it was admissible, and on that question of general admissibility the case was argued. If the evidence is inadmissible, there is no ground for saying that because an insufficient reason for its rejection has been put forth in the Court below, a better reason may not be relied on here. In objecting to the result at which the Judge arrived when he admitted the evidence, the objector is not bound to confine himself to the first ground on which he rests that objection, the more especially when the other side asserts the general admissibility of the evidence. Here the evidence was inadmissible. The English law had nothing to do with the case : the law of Scotland was that which ought to have been administered in the Courts of Scotland, and if that law had been

<sup>1</sup> 3 Clark & Finnelly, 544.

<sup>3</sup> Section 557, et seq. 2d ed.

<sup>2</sup> 5 Clark & Finnelly, 1.

<sup>4</sup> 6 Adolphus & Ellis, 185.

administered, the evidence of the notices would have been rejected.

That brings us to the question as to the regularity of the notices. The 141st section of the Act declares that these notices "requiring authentication by the company, may be signed by two directors, or by the treasurer, or the secretary of the company, and need not be under the common seal of the company; and the same may be in writing or in print, or partly in \* writ- \*12 ing and partly in print." It is clear, not only that this section does not allow the signature to the notice to be in print, but that, impliedly, it forbids it to be so. The notice is permitted to be partly in writing and partly in print; but such a notice requires authentication, and that authentication can only be given to it by the signature of one of the officers mentioned in the statute. The permission to have a notice partly in writing and partly in print being expressly given, a similar permission as to the signature, is, by the well-known rule of construction, impliedly excluded. The name, if printed, would be no authentication, and to hold it to be so is to render the guarantie for the authenticity of the notice valueless, and to make the words of the section insensible.

Then as to the form of the entry of shares alleged to have been held by the appellant. That entry is not only defective according to the requirements of the statute, because it does not particularize the shares held by each individual, but it does not show the amount of money paid in respect of any share. Upon this point the directions of the statute must be exactly complied with, or the utmost confusion as to the amount of a shareholder's liability may be the consequence. By the 17th section of the statute no one can transfer any share till his calls on it are paid up; but how can any purchaser know that this provision has been complied with, if there is no distinguishing the sums paid on each share? And the further necessity for specifying what has been paid, is proved in this case, by the fact of the fourth call having been divided into three instalments, so that without some specific statement it was impossible to know what had been paid. And yet such knowledge affected not merely the value of the \* shares, but the right to transfer them; for by the 16th \*13 section of the statute, the holder of the shares could not

make a valid transfer until he had paid up the calls which might have been made upon him.

*Mr. Butt* and *Mr. McFarlane*, for the respondents.

The objection to Meyer's evidence cannot be argued here. It was abandoned in the Court below, and no part of the judgment there was pronounced on that objection. That judgment, consequently, cannot now be impeached, so far as that objection is concerned.

Then as to the reception of the evidence of English law : The objection made below was properly overruled. That objection proceeded only on the ground of surprise, and surprise alone is not a ground for rejecting evidence, but merely supplies an argument for the consideration of the jury, or for an application for a new trial. The party cannot now, on appeal, change the nature of the objection, and insist on the non-admissibility of the evidence. If he could do so, he might betray his opponent into giving evidence, which, if properly objected to at the trial, would have been withdrawn ; and having thus betrayed him, and taken a chance of a verdict, might afterwards come to obtain a new trial, or to reverse the judgment, on the ground of the admission of evidence which he had it in his power to exclude, but which he had allowed to be given, by colorably, and not fairly, objecting to it. The evidence thus admitted was correct, and the judgment founded on it is perfectly warranted by the principles and the authorities in the laws of Scotland as well as of England.

The register was properly described, and was admissible in \*14 evidence. The provision as to the name is \*merely directory ; and "proprietor," and "shareholder," are, in common understanding, synonymous terms. The object of the statute was to provide a book containing a list of the shares, and of the names of those to whom such shares belonged, so that persons interested might have full information as to those matters ; and that object has been attained here. The object was not to affix a special and exclusive name to the book, and to make the book, however properly kept, entirely useless unless it bore that particular name.

Then as to the form of the entry of shares. It was not necessary, when one man held several shares, to enter each of his shares separately, or to enter the amount paid on each particular share. If one man held several shares, they were sufficiently designated

by giving the number held, and then the first and last numbers affixed to them, and also the gross amount paid up on such shares; for the easiest and simplest process of arithmetic would settle the amount properly assignable to each. A different course of proceeding would unnecessarily multiply the books of the company, and occasion troublesome obstacles in the way of dealing with these shares. The legislature never could have intended to produce such a result. The book is, by the 29th section, merely to be *prima facie* evidence of the number and amount of shares held by each person; but is not to be evidence at all of the sums paid up on those shares. There is no ground, therefore, for this exception.

June 21.

LORD BROUGHAM. — The two chief points for consideration in this case are upon the bill of exceptions. The main contention of the parties applies to the second exception — the improper admission of evidence; and \*that part of the first \*15 exception which relates to the absence of any distinct statement of the amount of subscription paid on the shares. The 28th clause is that on which the objection as to the admission of the evidence is founded. That clause provides “that the production of the register of shareholders shall be *prima facie* evidence of such defender being a shareholder, and of the number and amount of his shares.” My judgment on this question proceeds on a narrow but a very material point in the construction of the Act, but before proceeding to that question, let us take the objections to the admissibility of evidence. The first point we have to consider is as to the reception of the evidence of an English counsel, upon the construction given by the Courts of England to that part of the English Act which relates to the authenticity of certain documents required under the Act. The evidence of that learned counsel was, that such documents did not require to be signed in writing, but that a printed signature was sufficient. What is the form of the exception to that evidence? It is this: “Whereupon the defender (the present appellant) objected to the evidence proposed, on the ground of surprise, in respect that the English law was not averred or mentioned on the record.” Surprise is the only ground here alleged. The exception however goes on thus: “The counsel for the pursuer did insist that the proposed evidence was competent and admissible, and the Lord Justice Clerk did repel

the objection preferred by the counsel for the defender, and allowed the English counsel to be examined as a witness." Repelled what objection? Why that which was preferred by the counsel for the

defender. But what was the objection? Was it an objection  
\* 16 that the evidence was in itself inadmissible? \* No, but merely

that surprise rendered it inadmissible under the circumstances then existing, — for that, as the pleadings then stood, the defendant was not warned that such evidence would be tendered. Then that was the ground of his exception. Now it is necessary that when a party excepts to the reception of evidence, to the rejection of evidence, or to the direction of the Judge given to the jury, whatever is the subject matter of his exception, he must state the ground of his exception, otherwise he cannot except. It is not enough for him to say, "I except to the receiving of A.'s evidence," or "I except to the rejection of A.'s evidence," or "I except to the first passage in the direction given by the learned Judge to the jury." If he objects to the reception of A.'s evidence, he must show why it should not be received, as by stating that A. is an incompetent witness. If, on the other hand, he objects to the rejection of A.'s evidence, he must show why it should not be rejected, as, for instance, that A. is a competent witness, and that his evidence is admissible, and that the rejection of his evidence is contrary to law. If he objects to the learned Judge's direction to the jury, he must state, not merely that he does object, but the ground on which he objects: he must show that the direction is contrary to law; he must show distinctly and specifically the ground of his objection. In all these cases the ground of objection must be clearly stated, and beyond the ground of the objection thus stated, the Court is not at all bound to look. Even if an unnecessary specification of a ground of objection should be made, beyond that specific ground the Court is not bound to look. The only question for consideration, under such circumstances, is, the value of the objection on the  
\* 17 ground thus specifically stated: In \* this case the ground of exception stated is surprise, and surprise only; not that the evidence was in itself inadmissible, but that it was inadmissible because the intention to adduce it had not been notified on the record. The ground was surprise only? The Court thinking that surprise was not, in itself, a ground for rejecting the evidence, held the exception so stated to be insufficient.

The insufficiency of the statement of objection by the party who

made it, is now attempted to be supplied from the answer given to that objection, and the whole question of the admissibility of the evidence is said to have been raised, because the pursuer's counsel is alleged to have insisted, generally, that the proposed evidence was competent and admissible. No doubt he did say that it was competent and admissible, but that was only a reiteration of the act of tendering the evidence; it did not extend beyond the objection which had been specifically raised. And the Lord Justice Clerk repelled the objection taken to the admissibility of this evidence; but that objection was the objection of surprise, and no other. I am therefore of opinion that the appellant is now shut out from his general objection to evidence itself, for the objection taken below was surprise, and surprise is no ground of objection.

This brings us to the third exception. The English counsel was examined, and then the appellant objected that which is now put forward as the third exception, but which is in reality the second. "The counsel for the defender did then and there, on his behalf, object to the aforesaid opinion of the Lord Justice Clerk, and did tender his exception accordingly"; not to the opinion that English counsel were or were not admissible witnesses, but to the opinion that surprise was no ground for refusing to receive their testimony.

I have considered the cases given to me on this \* point, \* 18 and I am of opinion that they do not apply to get rid of the defectiveness of this objection. I very much regret that this clumsy mode of proceeding was adopted in the Court below. There has been a slip there; the objection to admitting the evidence ought not to have been taken on the mere ground of surprise, but on the irrefragable ground on which the cases cited all proceed, — that the testimony here offered was no evidence, nor anything like evidence. I am sorry that we cannot now go into that question. I am sorry that your Lordships have not the opportunity of setting the Court below right on a most important point: for it is not merely on this case that the point bears; but it is a point of very general importance. The Court of Session has gone against all the principles of the law of this country on this subject, — the principles of the law of evidence, by which, unless in certain excepted cases, it professes to be guided. The Court has gone directly against the rules laid down in the two important

Scotch cases, decided here on appeal, *Yates v. Thomson*,<sup>1</sup> and *Don v. Lippmann*;<sup>2</sup> the former of which turned on facts strongly resembling these which exist in the present case. The case of *Don v. Lippmann* was directly decided on the applicability of the Statute of Limitations to the facts there; but it declares the principle of law applicable here, and so does that of *Yates v. Thomson*, which, as to circumstances, was almost on all fours with the present. It is perfectly evident that these cases are the law of the land on this subject: they follow and declare the law which had been clearly laid down in our Courts, in well-known cases, which draw the distinction between the *lex loci contractus* and the *lex fori*, and lay it down that the *lex loci contractus* is to be the governing rule as to the construction of all contracts between parties,

\* 19 \* and all transactions regarding personal property, but not affecting real property; but that the *lex fori* is to govern trials respecting real property, and that whatever relates to a remedy to be enforced, or to evidence, must, in either instance, be governed by that law. For example: in the case of a person domiciled abroad making a will, disposing, or assuming to dispose, of real estate in this country, the will must be in accordance with the real property law of this country; and the law of the country where he is domiciled is totally inapplicable to the case. On the other hand, in a personal matter, the *lex loci contractus* rules entirely the disposal of that matter, not only in the country where the contract is made and then sought to be executed, or damage sought to be recovered for its non-execution, but also in the Courts of this country, if the remedy is sought for here. As to the stipulations of that contract, our Courts are bound by foreign law, which must to them be matter of fact. But it is a totally different thing as to the law of evidence. The law of evidence is the *lex fori* which governs the Courts. Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not; that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the Court sits to enforce it.

The only point that required to be decided on in *Don v. Lippmann*,<sup>3</sup> was, whether the Statute of Limitations was in that case

<sup>1</sup> 3 Clark & Finnelly, 544.

<sup>2</sup> 5 Clark & Finnelly, 1.

<sup>3</sup> 5 Clark & Finnelly, 1.

applicable as the *lex fori*. One party contended that it was part of the *lex loci contractus* ; but we held that the statute was there part of the *lex fori*. In *Yates v. Thomson*,<sup>1</sup> no doubt was entertained upon the subject, and it was clearly \* held that the \* 20 Courts of Scotland were not bound to adopt foreign rules of evidence : every country having its own technical rules of procedure.

Here the Court of Session, disregarding this clear rule thus laid down, has proceeded against all principle and all authority. The objection to the evidence on the ground of surprise was rightly overruled ; but the evidence itself was wholly inadmissible, and should have been rejected at the trial, whether objected to or not. I trust, therefore, that such miscarriage may not again occur ; but that it may be distinctly understood that we affirm this judgment of the Court below for the reason that this objection, on the ground of surprise, was no objection at all ; but, at the same time, we have no doubt that the evidence must have been rejected had the other objection been taken at the trial. It ought to have been taken, and then it must have prevailed ; the Judge could not have allowed such evidence. The Inner House was of course confined to the matters stated on the bill of exceptions, and there the objection of surprise was raised, and was the only objection raised for consideration, although some of the Judges, by a manifest oversight, appear to have considered the general question of the admissibility of the evidence to be before them, and, deeming the evidence admissible, gave an erroneous opinion upon it.

See the consequence of not taking the objection in the proper form ; and see how impossible it is for us to overleap the bounds by which, in deciding on the admissibility of such evidence, we are limited. If we were to act on this objection now, it might be answered — “ If this objection had been taken below, instead of the objection being confined to the ground of surprise, *non constat* that the Court would have allowed \* the evidence, and \* 21 then there would not have been any ground of exception ; or, *non constat* that the respondents would not have withdrawn the witness, and then there would not have been any ground of exception ; or, *non constat* that they would not have proved their point in another and an unexceptionable way.”

On these grounds, therefore, I advise your Lordships to overrule

<sup>1</sup> 3 Clark & Finnelly, 544.



the exception, and support the decision below, and I desire that it may be understood that we do so, not on the ground that the exception could not have been taken, but, on the contrary, on the ground that the exception taken has been wrongly taken, — taken on a wrong point, — when, if it had been taken on a right point, it would have been invincible.

We then come to another point, the only one which seems to me to require much consideration, — I mean the form of the entry of the shares. I do not, however, think, upon the whole, that it can be contended that the books omitting to distinguish each share by its particular number, is a sufficient objection. This part of the statute does not require, and would not justify, so absurd a construction as to require that if a man has a thousand shares, there must be a thousand lines, each line stating one of his shares. If all his shares stand in the same predicament with each other, there is a substantial compliance with the statute. But another part of the exception objects, not only that each share is not distinguished by its number, but also that the books do not set forth the total number of shares held by the defender. I think that this further objection is not founded in fact, and that the effort of arithmetic required to arrive at the total number, so much relied on in the argument, is really a very little effort after all. But the third ground

of exception, that “the books do not show distinctly the amount  
\* 22 of subscriptions paid on \* the shares held by the defender,”

does appear to be somewhat better founded. And if I had found that this amount was not distinctly set forth, my opinion would have been in favour of the appellant, because it is most important that every thing should be done which the statute (8 & 9 Vict. c. 17) requires to be done, and for this reason. A great privilege is bestowed by the Act upon the company, neither more nor less than that of making evidence for itself. The books of the company are made evidence for the company, and, unless rebutted by counter-evidence, will be sufficient to warrant a verdict in each case. It must be admitted that this is a very great privilege, and an exception to the ordinary rules of evidence. By those rules, and the rules of common sense and justice, what a man writes is evidence against him, but not evidence in his favour: but here the proposition is reversed. So that the company, by writing in the books that “A. B. holds” a certain number of shares, can go into Court and make A. B. answerable for them, and can produce the

entry as evidence against him. This is a great privilege, and in order to justify the exercise of it, the conditions on which it is given, namely, the provisions of the statute as to the making of these entries, must be strictly complied with ; and I hold that it is much safer to consider each of those provisions as a condition precedent, as a provision imperative, and not merely directory, on account of the great importance of the privilege itself, and on account of its being an exception to all ordinary rules of evidence. If, therefore, I had not found a distinct compliance with the requisitions of the 9th section, I should not have considered that the 29th section was of any avail to the applicant in making these books evidence for him, and against his adversary.

Let us then see how the terms of the various sections \* in \* 23 the statute relating to these books have been complied with.

The 9th section says that "the company shall keep a book, to be called 'the Register of Shareholders'; the book is in fact called 'the Register of Proprietors,' " and is objected to as not being a compliance with the statute. I do not think that there is any force in that objection.

As to the others, I shall now state why I think that there has been a sufficient compliance with the provisions of the 9th section. We find it there said, "and in such books shall be fairly and distinctly entered, from time to time, the names of the several corporations, and the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholder shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares." My opinion goes on very narrow ground, being indeed founded on a single letter, "the amount of the subscriptions paid on such shares," and "the surnames," or "corporate names" of the "said shareholders," the words being in the plural number. Now I freely confess so disposed am I to look at the strict execution of this direction as a condition precedent to the enjoyment of the extraordinary privilege conferred by the 29th section, of making a man's own writing evidence for himself and against another party, that if, instead of the words being in the plural, they had been in the singular, I should have advised your Lordships on this point to give judgment for the appellant : for then it would have been the amount of the subscription paid on such share, and the surname, &c., whereas

it is "subscriptions paid on shares," and "surnames of shareholders." That carries you back from the last antecedent in \* 24 the singular, "distinguishing each share," to \* the previous antecedent, which is the number of shares which such shareholder holds, distinguishing each share by its number. Now I think that in this case each share is sufficiently distinguished by its number, to give almost a formal, certainly a most substantial compliance with the direction. When you put "No. 1551 to No. 1600," which letters and figures show fifty shares in successive numbers held by Mr. Bain, each share is distinguished by its number, because any body reading that entry must know that 1551 is the first, 1552 is the second, and 1600 is the last number of the parcel.

Then we come to the entry of 8600*l.*, as the amount of subscriptions paid on the shares, and I was at first disposed to consider the objection to this entry favourably for the appellant, because a lumping sum is given, and what portion of it is applicable to each share is not described. But I do not think that that objection can be taken advantage of, especially in a Court of last resort. I am not sure that, upon this point, if the case had been decided the other way, I should have recommended your Lordships to reverse the decision. But I do not think that there is sufficient ground to recommend its reversal now; the point is so narrow that the party who has possession of the judgment may well be allowed to keep it.

On the whole, therefore, I shall move your Lordships that this appeal should be dismissed, and the judgment of the Court below affirmed. And as I think that there was no real defence on the merits, I shall move that the judgment should be affirmed, with costs.

*Judgment of the Court below affirmed, with costs.*

\*THE EARL OF GLASGOW v. THE HURLET ALUM COMPANY. \*25

1850. June 25, 26; July 2.

THE EARL OF GLASGOW and JOHN WILSON and	}	<i>Appellants.</i>
SONS, . . . . .		
THE HURLET AND CAMPSIE ALUM COMPANY and	}	<i>Respondents.</i>
JOHN KING, . . . . .		

*Bill of Exceptions. Mines.*

A bill of exceptions was tendered to a Judge's direction, and, under the 55 Geo. III. c. 42, § 7, was signed by him at the time at the trial. The draft, thus prepared, was, some months afterwards, more formally drawn up, and was tendered to him for signature. He refused to sign it, unless a sentence, explaining his direction, was introduced into the bill, and the party excepting finally consented to its introduction. The bill of exceptions, with this explanation forming part of it, was presented to the Court:—

*Held*, that the introduction of this explanation was highly irregular: but that, being on the record, the Court below, and this House, could only look to the record, and could neither receive an affidavit of the facts, nor examine the draft of the exceptions, originally prepared and signed.

A lease of alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached:—

*Held*, that the coal pillars could not be removed.

THIS was an appeal against an interlocutor of the Court of Session, pronounced in a conjoined action of suspension and interdict, and of declarator, arising out of the following circumstances.

\*The Earl of Glasgow was the owner of certain land at \*26 Hurlet, which was in many respects very valuable for mining purposes. It contained mineral strata of various descriptions. Nearest the surface of the earth was a stratum of limestone rock, about three feet thick, below which was a bed of alum ore, or schistus, of about the same thickness, and below the alum was a seam of coal, of nearly double that extent.

The respondent King, and the company now interested with him, obtained, in the year 1800, a grant of the alum ore for a

period of sixty-two years, and the question between the parties related to the manner of working the mines respectively belonging to them. All these mines had been previously worked, and there had been a contract for obtaining all the copperas stones from the coal pits and the coal wastes. Alum, however, having become more valuable, and that which came from these mines being of the best sort, this contract of 1800 was made between the persons composing the Alum Company and the Earl of Glasgow, by which he “does hereby assign, sell, and convey, to, &c. their heirs or assigns, the whole ore in his said coal pits and coal wastes at Hurlet, from which alum can be manufactured, excepting the pyrites or copperas stones, which are already conveyed to the partners of the Hurlet Company, to work and collect the said ore in all the old coal pits and coal wastes at Hurlet; to open up old pits where the same may happen to be now shut; to erect gins or other machinery for draining the said ore to the surface, and to make roads and passages for conveying the same from the pits to the adjacent public roads; but reserving to the said Earl, his heirs,

&c. and the tacksmen of his coal works, lime works, iron  
 \* 27 stone and other metals, the exclusive use, \* at all times, of five pits, to be from time to time made choice of for the purpose of working coal, lime, iron stone, and other minerals; and declaring that while these five pits are thus appropriated, the said (grantees of the alum) shall have no right of access thereto, for collecting or cutting out alum therefrom; but in the event of the said Earl, or his foresaids, purposing to work limestone in any of the pits after the coal has been wrought out, and from which the alum ore has not been taken away, he and they shall be bound to give the said (grantees of the alum) two months’ previous intimation of such intention to work limestone, or, in case of failure to give such intimation, that they shall shovel the ore aside at their own charges, so as the same may not be wasted. Further the Earl agrees, that, in the event that he or his foresaids should cease to work the coal and limestone, and should desist from drawing the water out of the waste, the machinery which has been employed for drawing the water shall be sold and delivered over to (the grantees of the alum) at valuation, &c., who shall afterwards have liberty to draw the water from the coal waste during the remainder of this contract. And the Earl binds himself and his foresaids not to fill up any of the pits now open, or hereafter to be opened, for working

coal or lime at Hurlet, the (grantees of the alum) hereby becoming bound to fence in a sufficient manner all such pits as shall be left by the Earl or his foresaids within two weeks after being given up. And he likewise grants to them and their foresaids, during the said period, the liberty and privilege of returning the washed ore from their alum works, and depositing the same in any of the coal pits at Hurlet, where the limestone has been previously wrought out. For which causes the said \* (grantees of the \* 28 alum) bind themselves to pay to the Earl, his heirs, &c. a clear lordship of one shilling and sixpence sterling per ton for the whole alum ore to be taken by them from the said pits, free of all charges, &c." For twenty years the works went on at a great profit, both alum and copperas being procured from the ore; but chemical discovery rendered the alum less valuable, and, from time to time, the grantees allowed their works to remain idle.

Wilson and Sons became, in 1835, the lessees of the coal and limestone mines for a term of years ending in 1852. In the lease of the coal mines, giving them the right fully to work the coal, there was, among others, the following exception: "It is hereby declared that nothing herein contained shall in any way injure the rights of the parties who lease the alum and copperas ores from the said Earl of Glasgow."

The established mode of working the coal mines up to 1843, had been by what was called stoop and room; the stoop being the pillar which was left for the support of the roof, and the room being the space left between the pillars upon excavating the coal. The room was also called the waste, and the fall of the roof which produced what was called the extinction of the waste, was known by the name of a crush. When it once commenced it often extended far beyond the immediate neighbourhood of the pillars actually removed, the lateral pressure destroying the roof for a considerable distance. A crush was always liable to be occasioned by the removal of the coal pillars, and as it rendered the obtaining of the alum impossible, the right of the lessees of the coal to work (that is to say, to remove) the coal pillars, was the question raised in this case.

\* In 1843 the lessees of the coal began to remove the coal \* 29 pillars, and a crush of a very extensive nature followed. Some arrangement was for a time made between the parties, but, in November, 1846, the grantees of the alum presented a note of

suspension and interdict, praying that the lessees of the coal might be prevented "from cutting out and removing, or weakening and injuring any of the pillars in the coal pits and coal wastes, whereby the same, or any of them, might be shut up, or the access thereto endangered during the remainder of the lease of the alum ore." In answer to the prayer of this suit, the Earl and the lessees of the coal mine insisted that, by the grant of 1800, he was "under no necessity to refrain from working the coal pillars as well as the other coal on the lands of Hurlet, when circumstances should render this necessary, or when he should think proper to do so."

While the case was under discussion, but after an interdict granted, Messrs. Wilson, the lessees of the coal, offered to collect and bring to the mouth of the mine the whole alum ore, either taken from the top of the coal pillars, or found in the wastes, and to allow King and the company to take it away, on payment of one shilling and sixpence a ton, within six months from the time of intimation of its having been brought to the pit's mouth being given to them; in consequence of which offer the Lord Ordinary recalled the absolute interdict he had previously granted, but allowed the suspension prayed for, the effect of which was to permit the coal lessees to continue their work, subject to responsibility in damages.

King and the Alum Company then brought an action of declarator against Wilson and Sons, in order to have the extent \* 30 of their relative rights ascertained and \* declared, and the amount of damages assessed, and the Lord Ordinary settled three issues for trial, of which the first alone now requires to be considered: "Whether the defenders, or any of them, have removed, or are in the course of removing, or unduly diminishing wrongfully, and in violation of the rights of the pursuers, under the said contract or lease [of 1800] coal pillars in the pits or wastes under the lands or farms comprehended in the said contract, to the loss, injury, and damage of the pursuers."

The cause came on for trial before Lord Ivory, as Lord Ordinary, on the 3d of April, 1849. It lasted eight days, and, at its conclusion, his Lordship stated his construction of the lease to be in favour of the pursuers, and directed the jury accordingly. The counsel for the defenders took two exceptions to this direction: first, — "In so far as his Lordship directed the jury in point

of law that, according to the sound legal construction of the contract, it gives the pursuers the right, throughout its endurance, to prevent the landlord, or his tenant in the coal, from removing the pillars in so far as necessary to support the roof, though all the solid coal should be wrought out; secondly,—In so far as his Lordship declined, when requested by the defenders, to direct the jury in point of law that there is nothing in the contract of 1800, or in the leases of the coal of the defenders, to bar the Earl of Glasgow, or any person deriving right from him, to work out the pillar coal in a fair and regular manner after the solid coal is exhausted.”

The bill of exceptions was first prepared with the exceptions as stated above, and in that state was signed by the Judge. The jury returned a verdict for the Alum Company, with 5000*l.* damages. The bill of \*exceptions afterwards became the \*31 subject of discussion between the parties, and the Judge refused finally to sign it, unless the following paragraph (here marked between brackets) was introduced as explanatory of his direction: “In charging the jury, the Lord Ordinary stated as the legal construction of the lease of 1800, that the said contract or lease gave right to the tenant throughout its endurance [and so long as there should exist in the pits or wastes comprehended in the contract, alum ore unexhausted and workable, being part of the subject thereby conveyed or let] to prevent the landlord, and all deriving right through him, from removing the coal pillars in the said pits or wastes, in so far as these were necessary to support the roof of said pits or wastes, and thereby to preserve the requisite access for working the said alum ore; and that it mattered not, as regards this question of construction, and the rights of the tenant of the alum ore in respect of the same, whether the solid coal in the said pits or wastes should or should not have been previously wrought out.”

The defenders at first objected to this addition, but his Lordship persisted in requiring it, and they finally gave way, on which the bill of exceptions was signed, the following words being added, as its conclusion: “Whereupon the said counsel, learned in the law, for the said defenders, did then and there propose the aforesaid exceptions to the directions of the said Lord Ivory, and did request him to sign this bill of exceptions, according to the form of the statute in such case made and provided; and thereupon the



said Lord Ivory, at the request of the said counsel for the defenders, did sign the said bill of exceptions, pursuant to the said statute, on the 29th day of November, 1849, and in the fourteenth year of her present Majesty's reign. J. IVORY."

\* 32 \* When the case came on to be heard before the Inner

House on this bill of exceptions, which had been duly presented by the Judge to the Court, the defenders set forth by affidavit the circumstances attending the preparation of the bill of exceptions, and contended that the exceptions alone ought to be taken into consideration, as being alone the original bill of exceptions properly prepared under the statute,<sup>1</sup> and that the Court ought not to pay any attention to the statement explanatory of the direction introduced by the Lord Ordinary, for that the note tendered to the Judge at the trial, and then signed by him, was the only document which could be referred to. The Court, however, refused to refer to the affidavit, or to listen to any statement of fact, or to look at any thing but the bill of exceptions as presented by the Judge to the Court, and, on the questions there raised, gave judgment

\* 33 supporting \* his direction. On both these grounds the appeal was now presented to this House. Counsel were, in the first instance, directed to argue the question whether the bill of exceptions as finally presented to the Court, or the paper signed by the Judge at the time of the trial, was that on which the Court ought to have proceeded.

*Sir F. Kelly* and *Mr. Inglis* for the appellants (defenders in the Court below).

The Court was wrong in looking at any document as the bill of

<sup>1</sup> The 55 Geo. III. c. 42, § 7 (Scotch Act), by which it is enacted that "it shall be competent to the counsel for any party, at the trial of any issue, to except to the opinion and direction of the Judge before whom the same shall be tried, as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial; and that on such exception being taken, the same shall be put in writing by the counsel for the party objecting, and signed by the Judge; but, notwithstanding the said exception, the trial shall proceed, and the jury shall give a verdict therein for the pursuer or defender, and shall assess damages where necessary: and after the trial of every such issue, the Judge who presided shall forthwith present the said exception, with the order or interlocutor directing such issue, and a copy of the verdict of the jury indorsed thereon, to the division by which the said issue was directed, which division shall thereupon order the said exception to be heard in presence on or before the fourth *sederunt* day thereafter."

exceptions except that which was actually tendered and signed at the trial. The statement of counsel, fortified by affidavit, ought to have satisfied the Court that there had been some mistake, and that the bill of exceptions, tacked to the record, was not that which was the genuine one, and the Court ought to have removed that paper and replaced it by the other. The 55 Geo. III. c. 42, established in Scotland the power to tender bills of exceptions, according to the form so long prevalent in England; and the Act of Sederunt of the Scotch Courts, of the 16th February, 1841, adopting that as the rule, directs the counsel tendering an exception, to deliver a note of it to the Judge at the time the exception is taken, and say, "that it is to be certified by the Judge at that time, and that it is to be settled and certified, as aforesaid, before the jury is enclosed to consider the verdict." Strictly speaking, therefore, nothing but that which is signed at the trial constitutes the bill of exceptions, and though, for convenience' sake, parties are often permitted, as in this country, to make up the formal draft of the bill of exceptions within a few days after the \* trial, yet fresh matter is never allowed to be introduced \*34 into it. The Scotch Courts have hitherto acted on this rule, and have refused leave to amend or alter a signed bill of exceptions, even for the purpose of making it in conformity with the notes taken by the Judge at the trial. *Pollok v. Morris*.<sup>1</sup>

All the English authorities are to the same effect, and though the practice of the Scotch Courts cannot be governed by them, still, as the Scotch bill of exceptions was introduced in imitation of the law and practice existing in England, they are important for the purpose of illustration. Here, according to the statute, the counsel tendering the bill of exceptions made a note of the exceptions, and required the Judge to sign it. To sign what? The paper then tendered; — not the paper or parchment presented to the Court eight months afterwards; — and he did sign the paper which was then tendered to him, and having done so his authority in the matter was at an end. The Judge had no power to meddle with the exceptions after he had once signed the note at the trial. Any proceeding of his, after he had once employed and exhausted his power, was void. For a similar reason, in *Holt v. Mead-dowcroft*,<sup>2</sup> a trial before a common jury was set aside; because when there were no special jurors who answered to their names, the

<sup>1</sup> 7 Cases in the Court of Session, 973.

<sup>2</sup> 4 Maule & Selwyn, 467.

Judge, in spite of the defendants' objection, tried the case by a common jury. The fact that the defenders here accepted the bill of exceptions, thus altered, does not affect the case, for there the defendant had, under the pressure of necessity, taken part in the trial; but the Court held that his doing so did not get  
 \* 35 \* rid of the error in the proceedings. In *Lycett v. Tenant*,<sup>1</sup> the Court of Common Pleas adopted the same principle, and, because the date of the writ of summons which had not been inserted in the issue delivered to the defendant was inserted by the plaintiff in the writ of trial, that writ was set aside, notwithstanding the defendant had appeared at the trial, for as he appeared under protest, he was held not to have waived the irregularity.

*Mr. Bethell* and *Mr. Cockburn* for the respondents.

The decision of the Court below on this point was correct. That Court could not look at any thing but the document presented by the Judge as the bill of exceptions, and this House cannot look at any thing but the record. The party cannot be allowed to allege any thing against the record.<sup>2</sup> The real question is, What constitutes the bill of exceptions? and the answer is, that that which was presented to the Court by the Judge is the only document which authoritatively bears that character. It is not the bare act of sealing the bill of exceptions here, or of signing it in Scotland, that makes it binding past recall or change. It may be admitted that, strictly speaking, the bill of exceptions should be completed before the jury has delivered the verdict; but, in practice, every one knows that that strictness is not enforced; for to enforce it would, in many cases, lead to injustice. If, as originally prepared, the parties know that in the hurry of a *Nisi Prius* trial errors have crept into it, those errors may be amended, and the instrument finally presented to the Court by the Judge becomes the veritable and authentic instrument.

Besides, the object of the appellants here is to exclude  
 \* 36 \* a material qualification of law, as stated by the Judge to the jury, and the very object of a bill of exceptions is to bring before the Court above the law exactly as explained by the Judge to the jury. The Scotch authorities themselves show this. In *Adam on Trials by Jury in Civil Causes*,<sup>3</sup> it is said, that "a

<sup>1</sup> 4 Bingham N. C. 168.

<sup>2</sup> 314, 315.

<sup>3</sup> Buller N. P. 315.

bill of exceptions must be to some point of law; and this must always be kept in mind, for, if it deviates into matter of fact, such deviation renders it destructive of the object for which it is instituted, namely, to ascertain the correctness of the law laid down by the Judge at the trial. A bill of exceptions may also be tendered to the Judge's refusal to adopt a direction in point of law. Counsel may require a Judge to give a particular direction upon the law, and, if he declines, a bill of exceptions may be tendered. Such bill must contain a statement of the point of law for which counsel contends, and the Judge's refusal to direct as required gives the party the right to except." And again the same very learned writer observes:<sup>1</sup> "Bills of exception, if not introduced; were regulated in point of form in England by the ancient Statute of Westminster II. (13 Edw. I. c. 31). Like new trial, bill of exception is purely of English origin, so that every thing which relates to its form, application, and efficacy is to be learned by reference to the proceedings upon it in the Supreme Courts of England. The Court of Session, therefore, must be guided by the practice of England in all that relates to the frame and use of bills of exception; the sole and proper office of which, as has been said, is to correct the errors of the Judge who presides at the trial of civil causes, on the admissibility of evidence, \*or on the directions in matter of law given in the course \*37 of the trial.

It is, therefore, of the utmost importance that every part of the charge should be set out in a bill of exceptions, so far as it is necessary truly to show the part which is the subject of the exception; *Duff v. White*.<sup>2</sup> To state a proposition of law, without giving the qualification which accompanied it at the moment of its enunciation, would be to misrepresent the direction, and not only to do an injustice to the learned Judge, but to the party whose rights and interests might be thereby seriously affected. This is not the place in which to object to the bill of exceptions; nor was it right to do so on the argument below. If there had been any irregularity to complain of, it should have been made the subject of a substantive application to the Court for correction, before the case came on for argument.

*Sir F. Kelly* in reply. — There can be no doubt that the state-

<sup>1</sup> 316.

<sup>2</sup> 2 Wilson & Shaw, 204.

ment of law made by the Judge, with all qualifications, if there were any, ought to be truly stated. But that which was written at the time is more likely to be a true statement than any thing introduced some months afterwards. The exception must truly have represented at the time what had been the direction of the learned Judge, or he would not then have signed it. That which he then uttered was that which influenced the minds of the jurymen. There was, at that time, no thought of the qualification afterwards introduced. Its introduction was highly irregular,

\* 38 if not absolutely \* illegal ; but the appellants were compelled to submit, or no bill of exceptions would have been signed, and then judgment would have been taken against them without their having a chance of bringing it under review. The Court below being informed of the fact that the exceptions were signed at the trial, and that this addition was not made till months afterwards, ought, as a matter of legal regularity, to have rejected the latter, and have looked only to the former document. The object here is not to exclude a qualification of a direction, but a qualification which the appellants do not acknowledge to have been given with the direction which is the subject of the exception.

June 26.

LORD BROUGHAM.—This case, which has been very fully and ably argued, presents for consideration a preliminary question of great importance with a view to practice, and especially Scottish practice, in bills of exceptions. But as no doubt can be entertained as to the judgment which ought to be given upon it, I think it better that we should at once proceed to dispose of it. I consider that there has been very great irregularity committed in this case ; that the Act of Parliament has not only not been complied with in form, but that it has not been complied with even in substance. It has been in two several ways, if not broken, yet disregarded, and yet both of these deviations from the statute relate to matters most material for the due administration of justice.

In the first place, a trial which lasts eight days takes place in April, and gives rise to a bill of exceptions. The exceptions are tendered in writing, as by the statute they ought to be, and at that time they are signed by the learned Judge. There being

\* 39 some difficulty \* and doubt respecting the correctness of the writing then made, it is copied, and there are found some

verbal inaccuracies ; but there is one inaccuracy which cannot properly be called verbal. The inaccuracies are corrected, and the learned Judge who had affixed his signature to the body of the instrument, for greater correctness, and to prevent all mistakes, and also to show that all inaccuracy in the latter part of the instrument had been corrected, with his knowledge and with his consent, and, before he signed the instrument, also affixed his initials in the margin of it.

This then was, at the very least, that which ought to have been the governing instrument. Most emphatically it ought, because it was done *de recenti*, when the whole facts written were within the knowledge of all parties ; of the learned Judge and of the counsel on either side. This was at the beginning of April. It does not much signify whether the exceptions were prepared before or after the jury retired ; they were tendered before the verdict was given, and yet eight months afterwards, that is, at the end of November, the learned Judge signed another and a different paper, which was afterwards presented to the Court as the bill of exceptions. Is this according to the statute ? No such thing. The Statute of Westminster II. (13 Edw. I. c. 31) gives the bill of exceptions, and it is said that there is not in that statute any thing which makes the sealing of the bill of exceptions a binding and conclusive act. Perhaps not. Nevertheless the course of practice adopted by the whole profession, ever since that statute, is much to be considered. That course of practice is perfectly clear. It assumes that the bill of exceptions must be *de recenti*, if not even *de recentissimo*, drawn up and sealed. Here is the statement of the practice by my truly \* learned friend, the late Mr. \* 40 Tidd, the author of one of the very best books in the profession, most logically contrived and arranged, and which, I must say, in justice to the memory of that most industrious and remarkable man, — one of the greatest benefactors to the profession, — is, next to Comyns's Digest, the most perfect model of clear and logical arrangement, to be recommended to every student, as well as to every author in the law, and which is, in addition, one of the very few books in which you never look for what you want without finding it. Mr. Tidd gives,<sup>1</sup> with his usual accuracy, the form of bills of exceptions. Having given the Judge's directions, he proceeds thus : " Whereupon the said counsel for the said C. D.

<sup>1</sup> Tidd's Forms of Practical Proceedings, 328.

did then and there propose their aforesaid exception to the opinion of the said Judge, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said C. D. as aforesaid, according to the form of the statute in such case made and provided. And thereupon the said Chief Justice, at the request of the counsel for the said C. D., did put his seal to this bill of exceptions, pursuant to the aforesaid statute."

This shows the opinion of the profession according to which these precedents were formed and have been used, and it shows that opinion clearly to be, that a bill of exceptions ought to be drawn immediately, and sealed as well as drawn, *de recentissimo facto*; and manifestly this is extremely useful, because it excludes the chance of error, and gives the very best possible security for accuracy, the best possible guarantee against any fraud being

\* 41 practised by any party, or any \* error, from want of due recollection, being fallen into by Judges. This is the case in our

English practice, and the Scotch Jury Act more particularly binds down the parties by specific provisions, which are rendered still more stringent by the Act of Sederunt, of the 16th of February, 1841. Now these proceedings are to be according to the statute, which requires the exception to be put in writing, by the counsel for the party objecting, and the same to be signed by the Judge. It does not say that it must be signed at the very time; but it clearly means that it shall be signed then, or, at least, within a reasonable and a short time afterwards. And then the Judge who presides shall forthwith put his seal thereto, that is to say, after adding a note of the issues. It does not say of the evidence also, but no doubt the practice is, that the evidence shall be added, and also the verdict, which shows that it is to be signed before the verdict, and, notwithstanding the exception so given in, the trial is to go on, and then the exception, with the order directing the issue, and the copy of the verdict indorsed, shall be presented forthwith, that is to say, immediately afterwards, or, *de recenti*; so that the counsel shall present the exception to the Judge, and then the cause shall go on upon that exception. Can any thing be more obvious than that this excludes the supposition of a delay of eight months, with all the risks attending it? This case is certainly voluminous; but it did not require eight days to prepare this bill of exceptions, certainly not eight months. What is the consequence? A bill of exceptions

goes before the Court, which, by the matters before me, I am compelled to say, is not the bill of exceptions which the Judge signed, and ought alone to have signed. There has been interpolated a very important part of a sentence, \* and whether we \*42 agree, or not, with Lord Fullerton's opinion<sup>1</sup> as to its effect, or not, there is, at all events, a very material addition, of which, in my opinion, the party excepting has good right to complain. It is a great irregularity, and one much to be discountenanced, and which, I trust, will not again occur to interfere with the due execution of the Act of Sederunt, and the specific provisions of the statute.

Such is my opinion with respect to the unfortunate course that, owing to the long delay, has been followed in this case. But there can be no doubt that we are now shut out from considering what would have been the force of the exception, had not this passage been interpolated in the direction. The case is before us on a bill of exceptions tacked to a record, and though I can have no doubt that that is not the bill of exceptions signed, according to the statute, by Lord Ivory, and corrected by him, and immediately afterwards signed, both in the body and in the margin, to identify and authorise that correction, still the record is that to which alone we can now look as the bill of exceptions. It is all very well to argue, as Sir Fitzroy Kelly did, that the paper prepared at the trial was what the objecting counsel requested the Judge to sign, and that he was not requested to sign any thing else, and that his power was then at an end ; but, sitting here, we can know nothing of any bill of exceptions but that which is presented to us on the record, and the only bill of exceptions so presented to us is that which contains the passage \* objected to. I cannot \*43 take advantage of that which I have stated in my observations against this proceeding ; I am excluded from doing so as much as if I did not know of the existence of an original paper ; and your Lordships would be guilty of the grossest irregularity if you were to travel out of that which is before you, and to take the course suggested by the counsel for the appellants, namely, to

<sup>1</sup> His Lordship, when delivering his judgment as one of the Judges of the Inner House, expressed his opinion to the effect, that the part of the direction, the introduction of which was objected to by the appellants, was in substance clearly implied in that statement of the direction, which they insisted ought alone to be on the record.



disregard the bill of exceptions tacked to this record, and to proceed to consider the case on that which was signed at the time of the trial.

It has been contended that the appellants here are bound, because the irregularity was not made the subject of a substantive application to the Court. I do not think there is any thing in that. Under the apprehension incident to a verdict for 5000*l.* damages, the learned counsel for the appellants could not well do otherwise than take the bill of exceptions as it stood, and argue it as best they might. It has been ingeniously suggested that the Court had reason to suppose, from the statement of counsel, fortified by affidavit, that the proper bill of exceptions was not brought into Court, and might, therefore, have removed that one, and replaced it by that which was the true and lawful paper. I must say that I cannot conceive any proceeding more doubtful than that which has been so suggested ; and I do not think it possible from any knowledge which I possess of Courts of Error, that the Court could have yielded to such an application. The Judge in this country is required to acknowledge his seal, — that is part of the statute, and there is no proceeding without his acknowledgment of the seal, and it is only after he has made it that the Court

of Error becomes possessed of the bill of exceptions. His \*44 acknowledgment of the seal shuts out \*argument. The modern Act of Parliament does not say a word about the Judge acknowledging his signature. The signature is supposed to identify itself. But his presenting the bill to the Court is tantamount to the acknowledgment of the signature. Then it may be said, that here he presented one bill of exceptions when he ought to have presented another. But, at all events, we have that which he presented, and there cannot now be any averment against the record, which compels us to say that this is the bill of exceptions which Lord Ivory presented, tantamount to a Judge in England acknowledging his seal, and that all which this bill avers upon the face of it is true, namely, amongst other things, that it was signed at the request of the party. I have, therefore, no doubt whatever that we are shut out from any other consideration on this head. I never had any doubt from the first, but I wished the argument to proceed, because of the importance of the matter in point of practice.

It is fit that these things should be considered, on account of

the alarming consequences of such irregularities. The practice as to bills of exceptions is, of necessity, slovenly to some degree, because you cannot be quite certain at what time you ought to tender them. All that can be said is, that this should be done as speedily as possible after the trial. I look upon the original paper, therefore, in the light in which it must have been looked upon by Lord Ivory, that is, not as the bill of exceptions, but as containing the materials for the bill of exceptions, and that after this, which I will call the draft bill, was signed, it was to be made out more formally, and signed by him when in proper and perfect form. But the bill of exceptions on the record contains a passage, the materials for which this \* paper did not contain: it con- \* 45 tains a passage beyond the paper, and that passage it ought not to have contained. Over that, however, we have here no power. We can form no opinion upon it, nor will it be proper to consider its materiality; for whether material or not does not affect the question. The only question we have now to consider is, whether or not the exceptions are good in point of law.

The case was then argued on the construction of the grant of 1800.

*Sir F. Kelly* and *Mr. Inglis* for the appellants. — There is no ground for the proceedings taken here against the appellants. The grant of 1800 is not a conveyance of the wastes, but only a grant of the ore to be found in the wastes. It does not oblige the Earl of Glasgow, or his lessees of the coal, to work the mines in a particular manner, and certainly does not prevent them from fully working their own mines, lest they should injure the produce of another mine which had not been worked as it might have been, and which was left unworked for the convenience, not to say at the caprice, of the respondents. In such a state of things, the law does not require, and the grant here does not compel, the appellants to work or not to work their mines, so as to suit the convenience of the respondents. Nor is there any obligation that the respondents shall use only one particular mode of working the mine. There are three modes of working coal mines in Scotland. Had the appellants used either of the other two, instead of that by stoop and room, the whole of the coal would have been cleared out at once, and the alum must then have been removed at the same time, or must have been lost. It never was the inten-

\* 46 tion of the \* parties to allow one set of contractors or tenants to abstain at their pleasure from working the mines, and then, because the other party might, by working them, endanger what the first had refrained from removing, to prevent them from being worked. Such a mode of dealing with the property would have made it utterly valueless to its owner, whose only revenue consisted of a lordship upon what was raised from the mines. Yet the direction to the jury assumes that such was the contract, and thus gives an unfair and unwarranted advantage to the Alum Company at the expense of every other person.

*Mr. Bethell* and *Mr. Cockburn* for the respondents : —

The argument on the other side assumes that all these parties possessed equal rights in relation to each other. But that is not so. The coal lease was granted subsequently to the alum lease, and must, therefore, be construed subject to the rights already vested in the previously constituted lessees. Now, it is clear that the lessees of the alum were not bound to work the alum mines in any particular manner ; but the coal lessees were bound to work the coal mines so as not to interfere with the alum works. There was a particular exception in their lease to that effect. It was upon this exception, coupled with the provisions in the lease to the Alum Company, that the direction of the Lord Ordinary was founded, and that direction was fully warranted by the ordinary rules of construction, and by the plain intentions of the parties.

July 2.

LORD BROUGHAM. — This case turns upon two points. We disposed of the first, respecting the additions which were made  
\* 47 to \* the bill of exceptions, very irregularly, in a manner much to be disapproved of, and such as I hope will not occur in future. We disposed of that point on the first occasion of the case coming before your Lordships, and before the second argument, which was upon the merits of the case, was heard. The question now more immediately under consideration is as to the two exceptions which have been taken, and both of which bear upon the construction that is to be put upon the contract, and the leases of the coal to the defenders. The exceptions are these [his Lordship read them].

I have come, upon a full consideration of this case, to the con-

clusion at which the Court below arrived, agreeing with the learned Judge who tried the cause, Lord Ivory, in the construction which he put upon the contract. And I think that the reasons given by Lord Mackenzie, with his usual clearness, put the whole question in a very striking and commanding point of view. He said: "The pillars are never mentioned in the contract, a right to work out these not being reserved, while other rights are reserved," — a fact, which, he said, he considered most important. It is most important, when you consider that the support of the alum by these pillars was absolutely essential to the right conveyed to work the alum mines. That must never be left out of view where the question relates to two strata, the one superincumbent upon the other. It is further to be considered that there is a provision that the Alum Company shall have the liberty and privilege of "returning the washed ore from the alum works, and depositing the same in any of the coal pits at Hurlet, where the limestone has been previously wrought out." There is a manifest intendment here, and in the subsequent part of the lease, that there \*were \*48 to be wastes, that wastes were in contemplation as the necessary accompaniments and results of the work; and that those wastes were to be kept existing as open and vacant spaces "under the roof of which," wastes, "containing alum schistus," were "to be supported by coal pillars."

Upon the second exception I also agree with Lord Mackenzie, who justly observes, that here the matter is still clearer, and I must state that the concluding passage in the explanation of the construction given to the contract by that learned Judge is most material. The whole statement of the law, he says, is laid down by Lord Ivory, and is clearly explained by the concluding words, "that all the solid coal should be worked."

I am of opinion and have no doubt upon the subject, that the true construction was put before the jury in the direction of the learned Judge, and that this construction, the objection to which was the ground of the second exception, has been rightly adopted by the Court below. I am therefore of opinion against both the exceptions, and think that the decree of the Court below against the bill was right.

It is wholly unnecessary to enter at greater length into the reasons and grounds upon which I have come to this conclusion, for, in truth, they are the same with those upon which the learned Judges

in the Court below decided. I only thought it right to occupy your Lordships' attention for these few minutes, in order to note that upon the two points raised, and especially as to the first and most material exception, the reasons so forcibly put by Lord Mackenzie are sufficient to support the judgment of the Court below.

*Appeal dismissed, and interlocutors affirmed, with costs.*

\*49

\* TOMMEY v. WHITE.<sup>1</sup>

1850. June 18, 21; July 2, 25.

HENRY TOMMEY,	.	.	.	.	.	.	<i>Appellant.</i>
JAMES WHITE, ROBERT COURTNEY, GEORGE KER-	}						<i>Respondents.</i>
NAN, and THOMAS REID MILLIKEN, .							

*Trust Assignment. Sale without Notice. Rules and Practice in Appeals. Enrolment of Decrees and Orders. Judgment on Appeal irreversible.*

A debtor assigned his house and business, in trust for payment of his debts, retaining to himself the management of the business, under the superintendence of the trustees, who, on his failing to perform his covenants in the trust deed, were thereby empowered, after having given him three months' notice, to sell the house and business. Such notice was given, but waived by consent of the creditors and trustees, assembled at a general meeting:—

*Held*, that a sale afterwards made by the trustees, without further notice, was unauthorized and unlawful.

*Semble*, that a decree appealed from, but not adjudicated on further than the dismissing the appeal generally, may be included in a subsequent appeal.

*Semble* also, that decrees and orders which have not been enrolled may, after any length of time, on being enrolled, be brought under appeal with a recent order made in the same cause, and duly enrolled.

A judgment of the House of Lords is conclusive, and cannot be reversed or corrected, except by Act of Parliament.<sup>2</sup>

THE appellant carried on business as a hotel keeper in Dublin, in a house and premises which he held by lease from the respondent Milliken, for thirty years from January, 1832. Having, in

<sup>1</sup> See *Ex parte White v. Tommey*, 4 House of Lords Cases, 313.

<sup>2</sup> See *Wilson v. Wilson*, 5 House of Lords Cases, 41, 63.

this business, contracted debts to a large amount, he and his creditors agreed \* that he should have five years and eight \* 50 months for paying the debts, upon his securing the same by a demise in trust of the hotel for twenty years, and an assignment of his furniture, plate, &c. to the respondents, White, Courtney, and Kernan. He was to be left in possession for the purpose of managing the business, and they were to superintend his management of it during the said period, for the benefit of the appellant and the creditors. The respondent Milliken, at the same time, agreed with the appellant and the other respondents to erect additional buildings at the rear of the hotel, and to make certain alterations and improvements therein for the accommodation of the appellant, on his giving an equitable charge on the hotel and premises, to secure the amount of the expenditure occasioned by the proposed alterations.

In pursuance of these agreements, the appellant and the respondents, and other creditors of the appellant, executed an indenture, dated 13th May, 1833, whereby the appellant demised the hotel, and offices belonging to it, and all buildings thereafter to be erected thereon, to White, Courtney, and Kernan, for twenty years from the then preceding January; and he assigned to them the fixtures, furniture, plate, &c. (mentioned in a schedule to the indenture), to hold the same, upon trust to permit the appellant to carry on his business as an hotel keeper, in his said house and premises, for the term of five years and eight months from the date of the indenture, the said respondents, as such trustees, to receive all monies and profits arising from the hotel and business, and thereout,—after reimbursing themselves certain costs, charges and expenses, in the indenture mentioned, and paying rents, taxes, &c., and the salaries and wages of clerks and servants employed \* in the establishment, and all expenses and outgoings \* 51 incidental to the support thereof, to pay the creditors of the appellant, parties to the indenture, in the manner therein mentioned. And the appellant covenanted that he would faithfully manage the hotel for the benefit of his creditors, without wasting or misapplying any of the monies, goods, furniture, or effects so assigned by him, and would render to the said trustees, once a week when required, a full account of all monies received by him, and of all payments which he should make in carrying on the business of the hotel, and, after deducting the expenses, would

hand over the profits to the trustees, and that, without their consent in writing, he should not, for the said period of five years and eight months, enter into any trade, business or employment, except that of messman to the troops of the Royal Barracks. And the respondent Milliken covenanted with the appellant and the other respondents, in consideration of receiving from them a mortgage on the hotel and premises for 4100*l.*, to secure payment of his outlay, to erect, within eight months, the buildings before mentioned at the rear of the hotel, and to make alterations and improvements therein according to specified plans, and that the expenses of such buildings, alterations, and improvements should not exceed 4100*l.* And it was by the said indenture declared, that if the appellant should not pay due attention to the said hotel business, or if the same should not be carried on to the satisfaction of the trustees, they, in that case should, upon giving three months' notice in writing to the appellant, have full power and lawful and absolute authority, without his concurrence or interference, to sell by public auction or private contract, the

\* 52 said hotel and premises, \*subject to the said mortgage to Milliken, and also the fixtures, furniture, plate, &c. in the schedule mentioned ; and out of the proceeds of the sale to pay rents, taxes, wages, &c. and apply the residue in paying the creditors in the manner in the indenture mentioned : Provided that so long as the appellant should well and truly perform his several covenants and agreements, and that in case the profits of the hotel should, within twelve months from the occupation of the proposed new buildings, amount to 1000*l.*, and in each subsequent year to 1500*l.*, and that such sums should be applied in payments to the appellant's creditors, in such case no sale should be had of the hotel and furniture ; and if through any unforeseen circumstances, other than the act or misconduct of the appellant, the clear profits of the hotel should not amount to the said sums, and the appellant should render a fair account of the profits to the trustees, and should conduct the hotel properly, no sale thereof should be made by the said trustees.

Soon after the execution of the indenture, disputes arose between the parties, the appellant charging the respondents with neglect of the trusts and breaches of their covenants, and they, on their part, charging him, not only with inattention to the business of the hotel, but with pawning the plate and furniture there

of. On the 18th of December, 1833, they served him with a notice, that in pursuance of a power vested in them by the trust deed, they would, after the expiration of three months, sell the hotel and furniture; but at a meeting of the trustees and a majority of the creditors, held in January, 1834, that notice was agreed to be considered as abandoned, and it was resolved that all proceedings then commenced or intended to be instituted against \* the appellant should forthwith wholly cease, and \* 53 that all parties should thenceforth endeavour amicably to advance the welfare of the establishment. For some time the parties laboured together to give effect to their resolution, but on the 5th of April, 1834, the trustees called on the appellant to give them possession of the hotel, in obedience to the notice of the 18th of December, 1833. The appellant refused to comply, but offered to refer all matters in dispute to arbitration.

On the 9th of April, 1834, the respondents (the trustees) filed their bill in Chancery against the appellant and the respondent Milliken, stating in detail, among various other matters, the circumstances above mentioned, — except the said meeting and resolution of January, 1834, — and charging the appellant with breaches of his covenants, by connecting himself with the United Service Club in Dublin, to the neglect of his hotel business, by omitting to furnish the trustees with weekly accounts of the receipts and expenses, and by obstructing the completion of the buildings which Milliken had agreed to erect in the rear of the hotel; and that by reason of these and other alleged breaches of the said covenants, the trustees were entitled, upon their said notice, to sell the hotel and other trust property. The bill prayed a reference to the Master, to take various accounts, and that the trustees might be put in possession of the hotel and property therein, for the purpose of settling the same; or that a receiver might be appointed to manage the hotel; and that an injunction might be issued against the appellant's interference therewith.

In pursuance of two orders made by the Master of the Rolls, dated respectively the 25th of April and 15th of May, 1834, both of which are now appealed from, \* George Milliken, \* 54 brother of the respondent, was appointed a receiver and manager of the hotel business, and the appellant was removed therefrom.

The appellant put in his answer to the bill on the 14th of May,



denying most of the allegations and charges contained therein, and imputing to the respondent Milliken misconduct and delay in erecting the additional buildings, and to the trustees breaches of their duty, and — after referring to the said amicable resolution of the creditors in January, 1834 — stating that if the said additions to the hotel had been duly completed, and the other provisions of the trust indenture had been faithfully observed by the respondents, the profits of the hotel would, in a reasonable time, have paid off all the debts, and left to the appellant property equivalent to the money and labour expended on it by him.

The respondent Milliken having also answered, and the cause being at issue, numerous witnesses were examined on behalf of both the appellant and the respondents. The cause was heard by the Lord Chancellor, and by his Lordship's decree, dated the 30th of January, 1835 (now appealed against), it was ordered that the said hotel, with the fixtures, furniture, &c. should be sold by the Master, pursuant to the terms of the trust deed of the 13th of May, 1833, and it was referred to the said Master to take various accounts in the decree mentioned.

The hotel and premises and furniture were sold to the said George Milliken for 2200*l.*, and the Master's report of the sale and of the accounts and other matters referred to him was confirmed by a decree made by the Lord Chancellor on further directions, dated the 3d of June, 1836 (now appealed against); and it

was thereby ordered that the respondents, the trustees,  
 \*55 \* should be paid the expenses incurred by them in the trusts, and their costs in the cause, out of the fund in Court, the proceeds of the said sale; and that the respondent T. R. Milliken also should have his costs thereout; and that the residue thereof should be divided among the creditors of the appellant, parties by the trust deed, after paying all debts that were incurred by the appellant in managing the hotel subsequently to the date of that deed.

Several other orders were made in the cause, one only of which it is necessary to mention as being comprised in the appeal: namely, an order dated the 10th of July, 1849, under which T. R. Milliken was paid 104*l.*, out of the said trust fund, for his costs.

In 1836 the appellant, instead of appealing to this House against the said order of 1834, and the decrees of 1835 and 1836, filed a

cross bill, in the nature of a bill of reviver and supplement, and took other proceedings<sup>1</sup> against the respondents, and against the orders made thereon. He brought an appeal here, which was dismissed, with a remit of the cause to the Court of Chancery in Ireland.<sup>2</sup> He afterwards filed a bill of review for reversal of the orders made thereon, and also of the said decree of 30th January, 1835; he brought a second appeal, which was also dismissed.<sup>3</sup>

In 1848, soon after the dismissal of the last-mentioned appeal, Henry Tommey, jun., son of the appellant (his agent also in the present appeal), discovered that the said orders of April and May, 1834, and the decree of 1836, had not been enrolled. He then presented a petition in the appellant's name, for leave to appeal against them, and also against the decree of \* January, 1835, \* 56 on which the House did not give any judgment in either of the former appeals. The petition after stating that decree, and the decree of June, 1836, and the said order of June, 1847,<sup>4</sup> proceeded to state that the decree of 3d June, 1836, was not enrolled, although it was transmitted for that purpose to the Rolls Office, and the petitioner, being from such transmission, led to believe that it had been enrolled, did not, until the 24th of February, 1848, discover the fact that it was not enrolled, and he was thereupon advised to appeal against the said several decrees of January, 1835, and June, 1836, and also against the said two orders of April and May, 1834, mentioned in the decree of January, 1835; that although it appeared by an order of the House dated the 5th of February, 1846,<sup>5</sup> the petitioner appealed against the last-mentioned decree, which was enrolled in April, 1835, and against several orders of the Court of Chancery in Ireland, made in the year 1845, yet it appeared by the order of the House, made upon the hearing of that appeal, affirming the orders of 1845,<sup>6</sup> that the said decree of 1835 was not complained of in that appeal, and therefore the House did not make any declaration in respect of it; and as neither that decree, nor the decree of 1836, or the several orders forming the subject of the present appeal were ever adjudicated on by the House, the petitioner prayed that he might be at liberty to lodge an appeal against them forthwith, all of them

<sup>1</sup> 6 Irish Eq. Rep. 303.

<sup>2</sup> See 1 House of Lords Cases, 160.

<sup>3</sup> 6 Clark & Finnelly, 786.

<sup>4</sup> 79 House of Lords Journals, p. 664.

<sup>5</sup> 1 House of Lords Cases, 160.

<sup>6</sup> House of Lords Journals, vol. 80, p. 163.

having been pronounced in the same cause, and none of them except the said decree of 1835 having been enrolled.<sup>1</sup>

\*57 \*The petition was referred to the Appeal Committee.

The appellant's agent attended before the Committee, and submitted, on the authority of the case of *M'Dermot v. Kealy*,<sup>2</sup> and by the general rule of the Court of Chancery in Ireland of the 31st of March, 1817, that the enrolment of the decree of 1835 did not operate as an enrolment of the two orders of 1834, although they were therein referred to. He also referred to the case of *Brooke v. Champernowne*,<sup>3</sup> to show that the two years allowed by the general order of the House, No. 118, were to be counted, not from the time of procuring the decree or order appealed from, but from the date of its enrolment; and he referred to *De Burgh v. Clarke*,<sup>4</sup> to show that an appeal might be brought against a decree or order enrolled more than two years, by including in the appeal a recent order made in the same cause, and on that authority he submitted that the order made in that cause in 1847, and now enrolled and appealed from, would save the appeal against the orders of 1834 and decree of 1836.<sup>5</sup>

The Appeal Committee resolved, and the House ordered, "that the petitioner be at liberty to present his appeal against the said two orders of 1834 and the decree of 1836, with liberty also, when his appeal should be lodged, to present a petition to extend it, so as to include the decree of January, 1835."

The appellant having, in pursuance of that order, lodged

\*58 his appeal in June, 1848, presented a petition to \*the House at the same time, stating his said appeal, and that his embarrassed circumstances prevented him from bringing his appeal against the decree of 1835, within two years from the date of its enrolment, and praying that he might be at liberty to extend his said appeal to that decree, and also to the order of the Court of Chancery in Ireland, dated the 10th of July, 1847.

That petition also being referred to the Appeal Committee, the appellant's agent again attended, and the Committee, after consid-

<sup>1</sup> They have been since enrolled for the purpose of this appeal.

<sup>2</sup> 1 Phillips, 267.

<sup>4</sup> 4 Clark & Finnelly, 562.

<sup>4</sup> 4 Clark & Finnelly, 247.

<sup>5</sup> The reporters make this statement of what passed before the Appeal Committee from the communication of the appellant's agent, which is confirmed by the orders found on the Journals. See 80 House of Lords Journals, p. 307.

eration, reported that leave ought to be given to extend the appeal, as prayed, to the decree of 1835, and an order of the House was made accordingly, dated the 2d of September, 1848.<sup>1</sup>

*The Solicitor-General (Sir J. Romilly)* and *Mr. Butt* (of the Irish Bar), with whom were *Mr. Elmsley* and *Mr. Bilton*, for the appellant.

The several orders made in this case are erroneous, and the House, though now unable to do full justice to the appellant by restoring him to the possession of the property of which he has been unjustly deprived, will do all that can be done for him by reversing these orders and decrees. The deed of trust conferred no right upon the trustees to give notice to the appellant, except he had been guilty of a clear breach of trust. Now, at the time the notice was given, no breach of trust was alleged to have been committed. That which was afterwards set forth in the respondents' bill was a mere afterthought. And even had that pretended breach of the terms of the deed been properly liable to be so called, under the words of the deed, it was not a breach of trust in fact, and in dealing with \*the rights of parties in \*59 such a situation, especially where a very heavy penalty is to be enforced against one of them, a Court of Equity ought to take into consideration all the circumstances of the case. The pretended breach of trust was a pledging of the plate by the appellant, but that act was one which was rendered unavoidable by circumstances, and it was done, not for the appellant's private benefit, but for the purpose of enabling him to carry on the business of the hotel at the moment, and thus of insuring a benefit to the trust estate. There was no fraudulent concealment about the matter, and the plate, too, was redeemed at the earliest possible moment; there was no waste of the property which formed the subject of the deed. Under these circumstances the trustees had no right whatever to give notice to the appellant, and the notice of the 18th December, 1833, was, therefore, invalid.

But suppose that notice to have been a valid exercise of the powers of the trustees, then it was clear that by the act of the meeting, held in January, 1834, there was a waiver of the notice. That meeting was attended by the trustees and by a majority of the creditors, and the resolution then adopted was unanimously

<sup>1</sup> 80 House of Lords Journals, p. 432, 442, 859.

adopted, and was passed after the subject of pawning the plate had been discussed, and had been explained to the satisfaction of all present. So that even supposing (which is denied) that the trustees had a valid title to give the notice, that notice itself was afterwards expressly waived by a meeting composed of the creditors for whom these respondents were trustees, and of the trustees themselves, and the subsequent enforcement of that notice was contrary to all equity. That being so, the dispossession of the appellant under the notice of the 18th December was unlawfully made, and no dispossession could properly take place until \* 60 after another \* notice, founded too on a valid breach of the covenants in the trust deed, had been duly given. The waiver of the notice was not mentioned in the bill, and the order of the Court below proceeded on the assumption that the appellant had been guilty of a breach of trust, and took no notice of this waiver.

It is further submitted that, even if the circumstances of the case should appear to justify the trustees in giving the notice of the 18th December, 1833, that notice is not warranted by the terms of the deed. In construing a deed that contains such a power, to be exercised by trustees, a Court of Equity will see that its provisions are strictly followed. They have not been followed here. There is an express provision in this deed that if the income during the first year shall amount to 1000*l.*, and during the second and each succeeding year to 1500*l.*, and if such sums respectively shall be appropriated by the appellant for the payment of his creditors, no sale shall take place; and further, that if, by unforeseen circumstances, other than the misconduct of the appellant, such sum shall not be realized and appropriated, but that the appellant shall render to the trustees a just account of the profits, and shall diligently and honestly carry on the business of the hotel, no sale shall take place. Before the trustees could proceed to a sale under this deed, they were bound to show, first, that the sum of money mentioned in the deed was not obtained; and, next, that the deficiency in the sum actually obtained proceeded not from unforeseen circumstances, but from the misconduct of the appellant, and that he refused to render them a just account, and did not diligently and honestly carry on the business of the hotel.

No evidence of such a kind could be produced; and, there-  
\* 61 fore, the \* very conditions mentioned in the deed, as those on

which the power was to be exercised, have not been complied with.

All the orders of the Court below proceeded on the erroneous assumption then adopted, that the appellant had been guilty of a breach of the provisions of the trust deed, and consequently all of them are equally erroneous. The order of the 25th of April is besides bad, as it was obtained in the absence of the appellant, and was a surprise upon him, his counsel not being present in Court when that order was made. The order of the 15th of May proceeds entirely on the preceding order; and if the first cannot be maintained, the other falls to the ground as of course. The latter orders and decree recite the former, and proceed upon them, and the former being bad, the others cannot be supported.

On these grounds the orders and decrees of the Court below must be reversed; and if there could be a pretence for saying that the trustees had the right to give the notice, their right to proceed on it was expressly waived by the resolution of the meeting held in January, 1834.

(No counsel or agent appeared for the respondents, nor did they, or any of them, put in an answer to the appeal, although required to answer by the usual order of the House, the service of which order on each of them was certified by an affidavit.)

LORD BROUGHAM expressed a desire fully to consider the evidence given in the cause, in order to satisfy himself upon the question of waiver, on which, at that moment, he felt strongly inclined in favour of the appellant. It was the more necessary for him to take upon himself the examination of the evidence, as the House \* had not had the benefit of hearing arguments on \* 62 the part of the respondents. He should likewise wish to speak to Lord Cottenham on the subject of what passed in the Appeal Committee, on leave being granted to have the appeal heard. As to the case itself, it was clear, that the sale, which had been completely effected under the order of the Court, could not be set aside, and the parties restored to their original condition. If therefore the decree of the Court below was wrong, complete justice could not be done to the appellant; but that was no reason why their Lordships should not do him justice to the full extent of their power.

July 2.

LORD BROUGHAM. — My Lords, this is a case which comes before your Lordships under very peculiar circumstances. I have not, in all my experience of this Court of Appellate Jurisdiction, or in any other, known a case in the same situation. The decree appealed from is of fifteen years' standing, and the appeal was allowed to be brought only two years ago (in 1848). A petition for leave to appeal became necessary, in consequence of the great length of time which had elapsed, and, I may say, also in consequence of the unfortunate circumstance of the decree, in the course of that time, having been irrevocably executed, by the sale of the premises, which formed the subject matter of the suit in the Irish Court of Chancery. That petition was presented, and the result was this appeal, notwithstanding the laches of the appellant. His petition was presented, and I have had occasion to look at the petition, or rather the petitions, — for there were two, — and at the report of my noble friend, Lord Shaftesbury, the Chairman of Com-  
\* 63 mittees of this House, recommending the appeal to be \* heard.

That report contains no reasons; and I have communicated with my noble and learned friend, who then held the Great Seal (Lord Cottenham), and he, after the long lapse of time that has taken place, has only an indistinct recollection of the case having come before him when sitting in the Appeal Committee. He has no recollection, nor note which can lead him to any recollection, of the grounds upon which the particular favour was accorded. Nevertheless, here is the appeal before us, in consequence of that favour having been so granted; and we have heard it argued *ex parte*, which is another difficulty in the case, because it is always a more satisfactory thing for any Court, more especially the Court of last resort, to have both parties present, and to hear both sides. However, these are circumstances and difficulties of rare occurrence in the exercise of this branch of your Lordships' functions, and we must deal with the case as we find it.

My Lords, this was a bill to enable parties to effect a sale under a trust deed. A decree appears to have been made, and that decree, which was final as regards the sale, led to a sale. We cannot set aside the sale, for the sale was under the decree of the Court, to a *bond fide* purchaser, there being no fraud, and consequently the setting aside that sale is utterly and absolutely out of the question; the sale must stand. But, nevertheless, if we think

the decree is wrong; that there has been a miscarriage in the Court below, we are bound to do as much justice as we can, and to grant as much relief as we are able; and we are not to be prevented from granting that relief which it is within our power to grant, merely because of the delay that has taken place, and the circumstances which have attended it. It may be that we cannot grant that \* relief which we might wish it possible to \* 64 grant, for I am perfectly clear that in this case there has been a miscarriage. I felt strongly impressed with that view at the hearing; but I postponed advising your Lordships to deliver judgment until I had an opportunity of looking into the whole case, and considering the evidence. I have now done so, and I have been greatly aided by Mr. Lefevre, who has corrected the printed cases, which, till his corrections were made, were quite monstrous to look at; it is hardly possible to make one's way through them.

Notice was given of this sale in December, 1834,—a three months' notice, in accordance with the terms of the trust deed,—and in January a most important meeting was held—a meeting of the trustees and creditors—at the house of their attorney, K. Boswell. There were present at that meeting, White, Kernan, and Milliken (respondents), and the majority in number and amount of the several other creditors. As to what took place at that meeting, we have the evidence of two persons in particular, namely, Tommey, junior, and Thomas Higginbotham, one of the creditors. Higginbotham says, “that the said Boswell read a paper writing to the several creditors present, purporting to be an approval for the said creditors to sign, of the proceedings of the trustees under said trust deed, and to exonerate them; and the said Boswell did request of the said creditors assembled to sign said paper; saith that this deponent at first refused to sign said paper writing, but afterwards agreed to sign it, provided said trustees would stop all proceedings against said Tommey, and allow him to go on superintending and managing his hotel as usual.”

I ought to observe that one great objection then \* taken \* 65 to the appellant's conduct was as to his pledging the plate; but that was clearly a matter in which he was not blamable. According to the evidence, his pledging the plate was, in fact, for the benefit of the parties themselves, and there was no breach of covenant in his so doing. Higginbotham then says, following upon



that which I have just read, that — “this deponent considered this” (the arrangement proposed) “to be the best mode to be adopted in order to have the several creditors of the said Tommey ultimately paid their debts,” and he proceeds to add, that “this proposition of deponent being complied with, the said paper writing was not signed by the said creditors.” Indeed it would have been useless to sign it, for that was to make a surcease of the whole proceedings under the notice which had been given previously, in the month of December, the three months’ notice, which, by the deed, was necessary in order to enable the sale to be effected; every thing depended upon the notice, and that notice was to be inoperative in consequence of the agreement made with the creditors upon the proposition of the deponent.

He then adds, “that said Henry Tommey, junior, did make a statement at said meeting that the defendant Henry Tommey” (his father) “had no other resource but to pledge part of the plate of the hotel to meet a most pressing demand, and for necessities got to support said hotel, as he had applied to the plaintiff, James White, for money to meet such demand, but was refused, and that the defendant, Henry Tommey” (the appellant), “had on the following day after he had pledged the plate redeemed the same.” Higginbotham, upon whose evidence the case turns,

then goes on to add “that the several creditors present did  
 \* 66 \* appear to be perfectly satisfied with the explanation given by said Henry Tommey, junior, with respect to such plate.”

What may be found in the rest of the evidence against that last part of Higginbotham’s evidence I cannot say: there may be some contradiction in the evidence, and here and there, there is indeed; but I need not enter into that, because that is not the material point. The point upon which this case turns is the notice. The necessary condition precedent to the sale was a three months’ notice; and that three months’ notice given in December, was, in January following, waived by the parties for whom it was given. Henry Tommey, junior, gives evidence to the same effect, though less in detail, but he confirms so far the evidence of Higginbotham.

I have only one further observation to make, which is, that I should have been more satisfied if that evidence had been confirmed by the testimony of J. K. Boswell, the solicitor. That I have in vain looked for in the various parts of the case. If there is

any thing to be found in any part of this case to confirm Higginbotham's testimony, I should be glad to be referred to it.

*Mr. Butt.* — Boswell was the solicitor for the respondents, so that, of course, we should not have examined him.

LORD BROUGHAM. — He was the solicitor for the opposite party, no doubt, that is for the plaintiffs in the suit in the Court below. You would not call him, but they might call him, and you might then cross-examine him upon that point. He was examined upon other points ; but I do not recollect that he was examined \* upon this ; and Henry Tommey, junior, is not examined \* 67 upon the interrogatory upon which Higginbotham was examined, but he gave evidence confirmatory of Higginbotham, in answer to another interrogatory. But I do not find that Mr. Boswell was cross-examined upon that point. However, there seems to be no contradiction ; he might have contradicted Higginbotham, but he does not contradict him, and there was clearly this waiver of sale, and there was on this point, I believe, a miscarriage in the Court below.

I recommend your Lordships to reverse the judgment of the Court below, giving the appellant all the benefit you can give him by such reversal. That you cannot give him more is no fault of yours — it is his own fault : he should have brought his appeal before the sale. If he had timefully and with right speed brought forward this appeal, the judgment might have been reversed before the sale was effected. But he has chosen to let the time go by, and he must blame himself for the result. We give him all the benefit we can, which is to reverse the decree of the Court below. He now sues in *formâ pauperis*, and perhaps his circumstances may have been such as to have induced the Appeal Committee to grant him the favour of allowing him to appeal so long after the time fixed by the appellate jurisdiction. He would have no costs, whether pauper or not. The costs in the Court below will be, no doubt, affected by your Lordships' decision, and whatever costs can be recovered below, from the party who obtained the decree, the party paying those costs must now recover. The decree must be set aside as regards the costs, just as much as regards the sale, and I am afraid it will become a mere question of costs.

*Mr. Butt.* — The sale was, in fact, made to the \* receiver \* 68 in the cause, who was the brother of the respondent Mil-

likewise, and it is a question whether that sale can stand or not ; but that, of course, is not before the House now.

**LORD BROUGHAM.** — There was great laches on the part of the appellant, but that unfortunate occurrence was owing probably to his circumstances. It is said that the decree was not enrolled until a late period ; that is only removing his laches another step : he could not appeal until enrolment took place ; but it is his own fault.

*Ordered and Adjudged,* That the said decrees of the 30th of January, 1835, and the 3d of June, 1836, and all orders arising or proceeding out of the original suit or incidental thereto, be, and the same are hereby reversed, and that the bill of the said White, Courtney, and Kernan, in the said cause, be, and the same is hereby dismissed, with costs, to be paid by White, Courtney, and Kernan, to the appellant, and that the costs in the said cause which have been paid to or received by White, Courtney, and Kernan, or any or either of them, out of the funds to the credit of the said cause in the Court of Chancery in Ireland, or otherwise, either under the said decrees hereby reversed or either of them, or under any order in the said cause, and in all suits arising or proceeding out of the said original suit or incidental thereto, be repaid by White, Courtney, and Kernan to the said appellant : and it is further ordered, that the cause be remitted back to the Court of Chancery in Ireland, to do therein as shall be just, and consistent with this judgment.

On a subsequent day a petition was presented to the House by the respondents, praying to have the cause reheard, on the ground that they had been taken by surprise, and that they had not been heard at all.

Mr. White, one of the respondents, being present at the bar of the House, was called on to explain the grounds on which he had presented this petition ; and he said that the trustees had been quite taken by surprise by the recent proceedings before the

House ; they had imagined that, as the case had already

\* 69 been heard twice \* on appeal, and on each occasion the appeal had been dismissed by the Lord Chancellor (Lord

Cottenham), there was an end of the matter, and therefore, when the third appeal was presented, they expected it would be dismissed, as of course ; and as the estate had been heavily burdened with costs, the trustees did not think they ought to subject it to further expense. For these reasons, and not out of any disrespect to their Lordships' House, nor from any doubt as to the correct-

ness of the judgment of the Court below, they had abstained from appearing to argue the case. They now prayed to be permitted to be heard, as they felt no doubt that, if the decision of the House proceeded on the ground of waiver, they could satisfy their Lordships that the true facts of the case did not warrant the supposition that there had been any waiver.

LORD BROUGHAM said, that a final judgment had been pronounced by the House in this case, in which he was clearly of opinion that there had been a miscarriage in the Court below; and it was, confessedly, the fault of the respondents themselves that they had not been heard in answer to the appeal. After a final judgment of this House had been pronounced, that judgment could not be set aside, and the case could not be reheard, without an Act of Parliament passed for that purpose.

THE LORD CHANCELLOR (LORD TRURO). — It appears that judgment — a complete and final judgment — has been pronounced by your Lordships' House in this case. That judgment can only be vacated by a special Act of Parliament, to enable the parties, if injustice can be proved to have been done, to be again heard. I remember only one case in which such an Act was passed for such a purpose. Here I cannot say that any grounds have been made out to call on your Lordships \* to entertain this application. There is no precedent whatever,<sup>1</sup> without an Act of

<sup>1</sup> In the following instance the case was not reheard, but the judgment of the House having been founded, in one respect, on an error in fact, it was ordered to be amended.

McGavin v. Stewart, 4 Wilson & Shaw, 184. — This appeal against an order of the Court of Session was heard in July, 1830, and Lord Wynford, who presided at the hearing, moved the judgment of the House "that the orders appealed from be reversed, and the cause remitted to the Court of Session, with directions to submit the question of fact to a special jury; and that it be an instruction to the Jury Court to examine the parties *visà voce* before such jury."

When the appellant's petition to apply this judgment came before the Court of Session,<sup>1</sup> a difficulty arose as to the practicability of doing so, according to the established forms of that Court, and of the Jury Court.

The Lord President, remarking on these difficulties, said, that he did not feel that the Judges of the First Division could act on the judgment, but must postpone the case until they had taken the advice of the other Judges of the Court of Session. He added that there was one fact, of much importance, which was probably not known to the House at the time the judgment was pronounced,

<sup>1</sup> 9 Cases Court of Session, for 1831, p. 17.

\* 71 Parliament passed \* for that purpose, in which a case has been reheard at the bar of this House, after a final judgment pronounced.

*Application refused.*

namely, that one of the parties ordered to be examined was dead. Of course, it could not be supposed that the House had intended that one of the parties to the cause should be examined when it was impossible to examine the other.

The case was postponed accordingly.

On a subsequent day.

The Lord President said that they had advised with the other Judges, who all concurred in opinion, that it was impossible, as the judgment stood, to apply it, and they had authorised him to submit the matter respectfully to the Lord Chancellor for the consideration of the House of Lords.

The motion to apply the judgment was, therefore, ordered to stand over till the matter could be submitted to the Lord Chancellor.

On the 17th of October, 1831, an order was made by the House of Lords, directing the agents on both sides, in the cause of McGavin v. Stewart, to attend the House on the following day.<sup>1</sup> On the 18th of October the agents appeared at the bar of the House, and Mr. Mundell, the agent for the respondent, being examined, stated that two of the parties directed to be examined were dead.

The Lord Chancellor (Lord Brougham).<sup>2</sup> — There can be no doubt whatever as to the proper mode of proceeding in this case. When your Lordships made the order directing that the parties should be examined upon oath, your Lordships meant that they should both be examined, or neither. It would be unjust to examine one of them without both being examined. But two of the parties intended to be examined are dead. This was a fact unknown at the time of your Lordships' order. I have conversed upon the subject with my noble and learned friend who attended the hearing of the cause, and know his opinion; and I now move your Lordships that the Clerk of the House do strike out the direction to examine the parties.

An order was thereupon made, which, after reciting the appeal and the judgment, proceeded thus: "And whereas it now appears upon examination of the agent for the respondent (the agent for the appellant also attending) that two of the parties directed by the said order of this House to be examined are dead; it is therefore ordered, that the clerk assistant do amend the judgment of this House of the 14th day of July, 1830, by striking out so much of the said judgment as directs that the parties should be examined *vis à voce* before a jury."<sup>3</sup>

See, on the subject of rehearing, the cases of *Stewart v. Agnew*, 1 Shaw's App. Cases, 413; and *Cathcart v. Cassilis*, 1 Wilson & Shaw, 239.

<sup>1</sup> House of Lords Journals, for 1831, 1097.

<sup>2</sup> House of Lords Journals, for 1831, p. 1099.

<sup>3</sup> 5 Wilson & Shaw, 808.

## \* REPTON v. HODGSON.

\*72

1847. July 1. 1848. July 10. 1850. July 5.

THE REVEREND EDWARD REPTON, Clerk, *Plaintiff in error.*  
CHRISTOPHER HODGSON, *Defendant in error.*

*Prebendary's Profits. Pleading.*

The 28 Hen. VIII. c. 11, § 3, gives the "tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties, or profits, certain and uncertain, afferring or belonging to any" dignity, prebend, or benefice therein mentioned, which shall accrue between the occurrence of a vacancy and a new appointment, to the appointee. The 5 & 6 Wm. IV. c. 30, directs the profits of dignities or benefices, without cure of souls, becoming vacant during the existence of a certain ecclesiastical commission, to be paid to the treasurer of Queen Anne's Bounty, who is to keep an account of the receipts and expenses, and retain the balance until he shall be otherwise ordered "by competent authority." By a subsequent statute the Crown is declared entitled to appoint, notwithstanding the existence of the commission in question, three persons to certain prebends therein named. One of these appointees, having duly demanded from the treasurer of Queen Anne's Bounty the profits received by him during the vacancy, brought an action for money had and received, to recover them. A special verdict (on a verdict found in his favour) declared these to be "the net profits of the prebend."

*Held*, that a judgment for the plaintiff given on this verdict could not be sustained, because it did not distinguish the sources from which these profits might arise, nor show whether they were derived from the *corpus* of the prebend to which he was individually entitled, or from sums due to him in respect of his share of the funds of the corporation aggregate, of which, as prebend, he was a member.

THIS was a writ of error on a judgment of the Court of Exchequer Chamber, by which a judgment of the \* Court of \*73 Queen's Bench had been reversed, and a *venire de novo* awarded.

The plaintiff in error here (plaintiff in the Court of Queen's Bench) brought an action of assumpsit against the defendant, to recover a sum of 295*l.* 0*s.* 2*d.*, claimed by the plaintiff as belonging to him in virtue of his character of a prebendary of the collegiate church of Westminster. The defendant, who was the treasurer of Queen Anne's Bounty, pleaded non-assumpsit, on which issue was joined.

The cause came on for trial before Lord Denman C. J., at the Middlesex sittings after Trinity Term, 1844, when a special case was agreed on, (afterwards turned into a special verdict,) which set forth the following facts : —

On the 21st of August, 1835, was passed the Statute 5 & 6 Wm. IV. c. 30, “for protecting the revenues of vacant ecclesiastical dignities, prebends, canonries, and benefices, without cure of souls, and for preventing the lapse thereof, during the pending inquiries respecting the state of the Established Church in England and Wales.” This statute set forth in the preamble that in the previous February the King had issued a commission for considering the state of the Established Church, with reference to ecclesiastical duties and revenues ; that the King had signified his intention to defer any nomination to any vacant dignity, prebend, or benefice, without cure of souls, in the patronage of the Crown until the circumstances connected therewith should have undergone the consideration of the Crown ; that the two archbishops and several bishops had declared their intention of pursuing the same course with respect to preferments in their patronage, and

that a similar declaration had been made by other patrons.

\* 74 The Act \* then went on to provide, that where any dignity, prebend, canonry, or benefice, without cure of souls, in the patronage of the King, or of any archbishop or bishop, or other patron, should become vacant during the existence of the commission, all the profits, &c. should be paid to the treasurer, for the time being, of Queen Anne’s Bounty, who, for the purpose of enforcing payment, was to enjoy all the legal rights that would belong to the lawful successor of the vacant preferment.

By the second section of the Act the treasurer was to keep an account of all sums received by him under this Act, separate from all other funds in his hands, and the section went on thus, “and shall retain the balance in his hands, until otherwise ordered by competent authority.”

On the 31st of March, 1836, a canonry or prebend of the collegiate church of Westminster became vacant by the death of Dr. Ryder, Bishop of Lichfield.

On the 13th of August, 1836, the 6 & 7 Wm. IV. c. 67, was passed “for suspending for one year appointments to certain dignities and offices in cathedral and collegiate churches, and to sinecure rectories.” The Act recited the 5 & 6 Wm. IV. c. 30,

and declared [that] all future appointments to any ecclesiastical dignity, &c. referred to in the recommendations of the commissioners, should be made subject to such measures and regulations as might hereafter be enacted respecting the same, except as thereafter excepted. The exceptions did not include the prebend or canonry to which the plaintiff was afterwards appointed.

On the 15th of August, 1838, was passed the 1 & 2 Vict. c. 108, entitled "An Act for suspending till the 1st of August, 1839, the appointment to certain dignities and offices in cathedral and collegiate churches and \* to sinecure rectories." This Act \* 75 recited and continued till 1st August, 1839, the 6 & 7 Wm. IV. c. 67, but by § 5, it was enacted, that "Nothing contained in this Act, or in the first recited Act, shall be construed to prevent the appointment, &c. of the Reverend Edward Repton, and two other persons therein named (formerly chaplains to the House of Commons) to any canonry, prebend, or dignity which is now vacant, or which shall hereafter become vacant during the continuance of the provisions of the recited Acts."

On the 7th of November, 1838, the plaintiff was appointed by the Crown to the canonry and prebend of the collegiate church of Westminster, which had been vacant since the death of Dr. Ryder, Bishop of Lichfield, and was duly installed therein.

On the 11th of August, 1840, was passed the 3 & 4 Vict. c. 113, by which the treasurer of Queen Anne's Bounty was required to deliver to the Ecclesiastical Commissioners a full account of the monies received and paid by him under the 5 & 6 Wm. IV. c. 30, and the subsequent statutes, and to pay over to the commissioners all the monies then remaining in his hands.

On the 29th of the same month the plaintiff, by letter, formally demanded the payment to him of the sum of 2952*l.* 0*s.* 2*d.* then due on account of the profits of his prebend.

On the 31st of August, 1840, the defendant wrote an answer to this letter, saying, that the matter was, by the 3 & 4 Vict. c. 113, out of his hands, and that the Ecclesiastical Commissioners were in action.

On the same 31st of August, Dr. Ireland, as Dean of Westminster, wrote a letter to the defendant, demanding the same sum as due to the Fabric Fund of the Collegiate Church of Westminster. The letter was in \* the following terms: "Ash- \* 76 burton, Devon, August 31st, 1840. Sir,—By the ancient



usage and custom of the collegiate church, if any division of profits is made during the time that any stall is vacant, the share belonging to such vacant stall is appropriated and becomes due to the fabric fund. Whatever, therefore, has been paid to you during the time that the stalls now filled by the Reverend Mr. Repton and the Reverend Mr. Frere were vacant, belongs rightfully to that fund, both because these stalls have not yet become subject to the Act for regulating ecclesiastical duties and revenues, and because they were not affected by the suspending Acts passed during the time that the aforesaid Act was in deliberation. It is my duty, therefore, to demand of you the sums wrongfully paid into your hands during the time these stalls were vacant, both on account of the justice of the claim and the urgent demands which exist at this time upon the fabric fund for the reparation of the Abbey. And I hereby give you notice not to pay any such sums to any one not duly authorised by me to receive the same on behalf of the said fabric fund."

The defendant did not pay over, either to the plaintiff or to the Dean of Westminster, the money thus demanded, but rendered an account to the Ecclesiastical Commissioners, and paid over the money to them under the last-mentioned statute, 3 & 4 Vict. c. 113.

The special verdict found that "the treasurers of the governors of the bounty of Queen Anne, in pursuance of the said statute [5 & 6 Wm. IV. c. 30], had, until the appointment of the plaintiff, received the profits of the said canonry or prebend; and that, at the time of the appointment of the plaintiff, the said treasurer \* 77 had in \* his hands a sum of 2952*l.* 0*s.* 2*d.*, being the net profits of the said canonry or prebend for the period between the death of the said Dr. Ryder and the appointment of the plaintiff, his successor"; and that "the plaintiff ordered, so far as he had authority so to do, the treasurer to pay to him, the plaintiff, the said sum, claiming to be lawfully entitled thereto, and lawfully authorised to order the payment thereof."

The special verdict came before the Court of Queen's Bench for argument, in Trinity Term, 1844, and the Court gave judgment for the plaintiff.<sup>1</sup> That judgment was brought before the Court of Exchequer Chamber, by which Court the decision of the Court of Queen's Bench was reversed, and a *venire de novo* awarded.<sup>2</sup>

<sup>1</sup> 7 Q. B. 84.

<sup>2</sup> 7 Q. B. 96.

The ground of the decision in the Exchequer Chamber was, that the special verdict was silent as to the nature of the profits demanded, or the source whence they proceeded; so that for any thing appearing on the face of the special verdict, they might be either derivable from the possessions which the prebendary held separately in right of his stall, or might be his share of the issues of the possessions held by him in common with the rest of the chapter. The present writ of error was brought on that judgment.<sup>1</sup>

*Mr. Martin* and *Mr. T. F. Ellis* for the plaintiff in error.

It is contended on the other side that the money now claimed by the plaintiff in error does not belong to him under the Stat. 28 Hen. VIII. c. 11,<sup>2</sup> independently of \* the question \* 78 whether the right to it has or has not been taken away from him by the Statute 5 & 6 Wm. IV. c. 30.

<sup>1</sup> The Judges who attended the arguments were Barons Parke and Alderson, and Justices Patteson, Coleridge, Coltman, Maule, Creswell, Erle, and V. Williams.

<sup>2</sup> The 28 Hen. VIII. c. 11, was passed "For the restitution of first fruits, in time of vacation, to the next incumbent." The first section recites, that in the statutes for the payment to the king of first fruits of spiritual promotions, benefices, and dignities, &c., express mention is not made from what time the year shall be accounted in which first fruits shall be due and payable to his highness. The second section recites, that also it is not declared who shall have the first fruits, &c. during the time of vacation, by which means bishops and archbishops have deferred collation to benefices, to the end that they might receive the tithes growing during the vacation, "so that through such delays over and above the first fruits (which be justly due to the King's highness), they have been constrained also to lose all or the most part of one year's profits of their benefices and promotions, and to serve the cure at their and their friends' proper costs and charges, or utterly to forsake and give over their benefices and promotions, to their great loss and hindrance." Wherefore, by section three it is enacted, for remedy of these evils, "that the said year in which the first fruits shall be paid to the King's grace, shall begin and be accounted immediately after the avoidance or vacation of any such benefice or promotion," and that "the tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties or profits, certain and uncertain, afferring or belonging to any archdeaconry, deanery, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity or office (chantries only except) within the realm or other the king's dominions, growing, rising, or occurring during the time of vacation of the same promotion spiritual, shall belong and affere to such person as shall be thereunto next presented, &c. towards the payment of the first fruits to the king, any usage, custom, liberty, privilege, or prescription to the contrary notwithstanding."

It is said that there are two descriptions of revenues

\*79 \* attached to the prebend ; that one is in the nature of property vested in the church, and is a common fund, to a share only of which the prebendary is entitled ; that the other is a fund to which he is entitled in his own individual right, and that though the latter is operated on by the Statute of Hen. VIII. the former is not. This distinction was for the first time taken in the Court of Exchequer Chamber. It is incorrect, and the course adopted by that Court in consequence of acting on that distinction cannot be justified by law. For even assuming a distinction as to the sources of the profits of the prebendary, to be capable of being taken for some particular purposes, still it is clear, that all his profits, from whatever source derived, are operated upon by the statute, which comprehends the whole of the income ; and, if so, then the award of a *venire de novo*, because the nature and origin of the funds constituting the gross amount claimed was not distinctly set forth, is wrong. Does, then, the statute comprehend all the sources of the prebendary's income ? It does. The words are " tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties or profits, certain and uncertain, affering or belonging to any prebend, &c." What is the language of the verdict ? It is that the profits in question are " the net profits of the prebend." It is for the net profits that the action is brought. Net profits must be included in one or other of the descriptive expressions used in the Statute of 8 Hen. VIII. in speaking of the profits to which the appointee is entitled. It is difficult to suppose any species of profits which the phrase " certain and uncertain profits" would not comprehend. Like Sinclair's well-known division of sleeping

into two sorts, namely, sleeping with or sleeping without

\*80 \* a nightcap, it would seem to exhaust the subject. Suppose the case to go to a fresh jury, in what other way could the claim be described than as one made to the profits of the prebend, and how could the jury find the existence of any profits which were not certain or uncertain. The treasurer here has received these profits as belonging to the prebend, as absolutely free from any liability to division, and from any demand to contribute to any corporate fund. They are the net profits, after all the demands on the gross profits have been provided for. They are the absolute property and incidents of the office : as such they

have been received by the treasurer, and as such he is liable to pay them over to the appointee. After having received them as the profits of the prebend, the defendant cannot deny that they bear that character.

The statement as to the custom of the church of Westminster, contained in the letter of the Dean of Westminster, and founded on this distinction, is no evidence of the fact there stated, and it is not so treated in the verdict. The jury merely found that the defendant had received the letter, not that the contents of the letter were true. But even if true, they would not take the profits out of the description given in the Statute of Hen. VIII.

[THE LORD CHANCELLOR. — The letter only puts the claim of the dean and chapter on a certain footing.]

The letter cannot be taken into consideration by the House. It shows that the dean made a mistake in law, and there is no reason to believe that he was more correct as to fact than as to law. It may, therefore, be properly contended, that the Court of Exchequer Chamber had no judicial knowledge that there was any separate property at all in any part of the income of this prebend.

\* The plaintiff in error contends, that by the Statute 28 \* 81 Henry VIII. all “ profits ” of the prebend belong to the successor in it, and that there is no ground for distinguishing between any classes of such profits. But independently of the express words of the statute, there is no authority for the alleged distinction between any portions of the funds belonging to the prebend, except an opinion of Godolphin, and that opinion is founded on a supposed dictum which does not bear it out. But even if the dictum was correct, it would not apply here, for the plaintiff here does not seek to recover a part of a corporate fund and a part of an individual fund, but a certain sum of money, which has been specifically and exclusively appropriated as the property belonging to this prebend, and as such paid over to the treasurer of Queen Anne’s Bounty, under the authority of 5 & 6 Wm. IV. c. 30. This exclusive appropriation of the fund gets rid of all question as to the origin of particular parts of the fund, and vests the absolute right to the whole of it in the prebendary.<sup>1</sup> Where the property has acquired this individual character, it becomes subject to the provisions of the Statute of 28 Hen. VIII. c. 11.

<sup>1</sup> See on this subject *The King v. The Lords of the Treasury*, 1 Harrison & Wollaston, 583; 4 Adolphus & Ellis, 286.

What is the authority for dividing the sum claimed by the prebendary into two parts? It is merely a suggestion of Burn,<sup>1</sup> made with a view to reconcile what he believes to be an erroneous opinion of Godolphin,<sup>2</sup> with the proper construction of the Statute of Hen. VIII. Burn first quotes Godolphin as saying, in the \* 82 *Repertorium* \* *Canonicum*, that “after the death of a prebendary, the dean and chapter shall have the profits,” and then he himself goes on thus: “But by the Statute of 28 Hen. VIII. c. 11, the profits of a prebend during the vacation shall go to his successor, towards the payment of his first fruits. In order to reconcile which, perhaps, the distinction may be this: that the issues of those possessions which he hath in common with the rest of the chapter shall, after his death, be divided amongst the surviving members of the chapter; but the profits of those possessions which he hath in his separate capacity, as a sole corporation of himself, shall be and enure to his successor.” Now the opinion in Godolphin is founded on a dictum of Chief Justice Thorpe, in 33 Edw. III. given in Fitzherbert’s Abridgment.<sup>3</sup> \* That, of course, refers to the law antecedent to the Statute of Hen. VIII. and, therefore, there is nothing to “reconcile.” If Godolphin’s statement meant to refer to all “the profits of a prebend” after the Statute of Hen. VIII., it is in direct contradiction to the terms of the statute. Whatever was its meaning, there are positive authorities which show it to be erroneous or inapplicable. In *Young v. Lynch*,<sup>4</sup> the action was for money had and received, and the question was whether there was in the plaintiff a legally vested right to this money: — not whether he could call on the dean and chapter to divide the general fund, but whether he could claim any share of the general fund as his, until after the division had taken place. The distinction was clearly expressed by Lord Chief Justice Lee, who said, that “under this statute, the person admitted to a \* 83 prebend is entitled to such part \* of the revenue of the church growing due during the vacancy, as is allotted to that prebend in particular,” and the party was held entitled to such profits as had been appropriated by division. Here the division has taken place, and the profits rightfully belonging to this particular prebend have been, as such, paid over to the defendant. The legal

<sup>1</sup> 2 Burn Eccl. Law, tit. Deans and Chapters, Ch. III. § 15.

<sup>2</sup> Repertorium Canonicum, Ch. VII. tit. Deans and Chapters, p. 52.

<sup>3</sup> Tit. Aide de Roy, pl. 103, pt. 1, fol. 35 a.

<sup>4</sup> Sayer, 84.

right to them cannot, therefore, be taken away by any act of any ecclesiastical body. In *Phillips v. Bury*,<sup>1</sup> Lord Holt said, of every member of an ecclesiastical corporation, that "he has no title to a penny in his own right till, by consent, the revenues are divided and distributed."<sup>2</sup> But when they are divided and distributed, his title becomes perfect and indefeasible. They are so here, and the observation applies to this case. In *Mosely v. Warburton*<sup>3</sup> the Bishop of Chester caused an application to be made to the Court of Queen's Bench respecting the execution of a writ of *levari facias* against the goods of the defendant, who was a fellow of Magdalen College. Lord Holt said: "If a prebendary hath a sole body, the bishop, upon a *levari facias de bonis ecclesiasticis*, may sequester it; but if he hath but an aggregate body with the dean and chapter, he cannot sequester it. In this case the profits of the fellowship are but casual dividends, in which, before division, Warburton hath no interest." These cases show that, after division, the profits are exclusively appropriated to each member of the body.

Assuming, therefore, that judicial notice can be taken of any distinction existing between the sources of the profits accruing to this prebend, then the House must also hold, that when once the division has taken place, and the prebendary's income has been separated \* from the common fund, his legal title to it \* 84 is complete.

The next point is, that on the true construction of the 5 & 6 Wm. IV. c. 30, the plaintiff is entitled to this money, for he had "competent authority," within the words of that statute, to order its payment.<sup>4</sup>

*The Attorney-General* and *Mr. Hugh Hill* for the defendant in error, as representing the Ecclesiastical Commissioners.

The first question here is, — What is the true construction of the 28 Hen. VIII. c. 11? But the parties here have not agreed on

<sup>1</sup> Skinner, 447.

<sup>2</sup> 1 Lord Raymond, 265.

<sup>3</sup> Skinner, at p. 488.

<sup>4</sup> The argument on this part of the case is not given, as the judgment of the House turned entirely on the defectiveness of the allegation in the special verdict, as to the different funds from which the profits were made up. The counsel for the plaintiff urged that, on this point, the Court of Exchequer Chamber must have agreed with the Court of Queen's Bench, inasmuch as, had they differed, the former must have reversed the judgment absolutely, instead of awarding a *venire de novo*.

the facts, or the law necessary to raise that question. The defendant contends that it is matter of law as well as of fact, that prebendaries have two descriptions of property, one portion belonging to them in their private capacity, the other in their corporate character, and, if so, then he says, that the facts are not so stated as to show whether any part or the whole of the fund now claimed belonged to one or the other of these kinds of property. In Burn's Ecclesiastical Law<sup>1</sup> it is said: "The possessions of the dean and chapter are, for the most part, divided; the dean having one part alone in right of his deanery, and each particular prebendary a certain part in right of his prebend; the residue the dean and chapter have alike; and each of them is, to this purpose, incorporate by himself, and the same page of Godolphin is \* 85 there \* referred to." The 5 & 6 Wm. IV. c. 30, dealt with this state of things, and the legislature had in view these two descriptions of property when the Act passed. The first section speaks of "all profits and emoluments, whether from houses, lands, tithes, or hereditaments to the same belonging, or from rents, fines, compositions, dividends, or other emoluments belonging to any chapter or other aggregate body of which the prebendary, &c. last in possession was a member." And the third section enacts, "that nothing in this Act contained shall apply to or affect any profits or emoluments of any dignity, prebend, &c. now vacant, which shall have been already divided or carried to any particular account, according to the statutes, customs, or usages of the cathedral or collegiate church in which such dignity may be founded." The words of these two sections leave no doubt that the legislature itself drew the distinction between the two sorts of property belonging to these dignities. They must, therefore, necessarily be treated as subject to different consequences. Westminster is now a collegiate church, but it was formerly a see, and in Bacon's *Liber Regis*<sup>2</sup> is contained an account of the various livings in different dioceses which belonged to it, and the amount paid thereon for pence and first fruits, and the origin and institution of this church, and the division of the emoluments among the dignitaries are there set forth. This shows that the distinction between the different sources of a prebendary's income is not a fanciful, but a real distinction, and consequently that it ought to have been set forth in the special verdict. There, however, it is left entirely doubtful,

<sup>1</sup> Tit. Deans and Chapters, Ch. III. § 9.

<sup>2</sup> Page 568.

and the party who does not correctly show what it is that he claims cannot support a general \* judgment in his favour, but \* 86 a *venire de novo* must issue.

This argument is warranted by the proper construction of the Statute of Henry VIII. That statute imposes a burden on clergymen, and therefore must be construed strictly. It plainly describes persons who may be the subject of nomination and appointment, and by the use of the words "fruits, &c. belonging to any dignity or office," it is clear that the payment was to be made in respect of what would belong to the appointees in their personal capacity, and not in respect of what was received by the corporation itself; and that reconciles all the difficulties arising from the fact that the prebends of Westminster do not now pay first fruits to the King. This circumstance will also fortify the opinion of Godolphin, and the dictum of Thorpe, that after the death of a prebend, and till the appointment and installation of his successor, the dean and chapter have the profits, and that these profits do not go to the successor. These profits, therefore, never could have belonged to the plaintiff, and he is consequently not entitled to sue for them. It is said that the words of the Statute of Henry VIII. are sufficiently large to carry every description of profits, but the answer to that argument is, that the words were intended to embrace not only every description of profits and every sort of ecclesiastical property, but every class of persons liable by law to pay first fruits to the king. The distinction taken in *Burn* is correct, and the cases cited do not affect it. The only real question in *Young v. Lynch*,<sup>1</sup> was whether the plaintiff could maintain money had and received, in respect of revenues, no share of which had been allotted to him at \* the time of action brought. The plain- \* 87 tiff had there selected the wrong person as defendant, for being the dean, he did not hold the fund as a trustee. The action was wrongly brought, and an improper defendant was selected; and these were ample reasons to explain the decision in that case. In like manner in *Phillips v. Bury*,<sup>2</sup> the question was, whether Bury, who claimed to be rector of Exeter College, had been properly removed by the visitor, and another rector appointed, so that the opinions cited from it are mere *obiter dicta*. These cases leave entirely untouched the objection that the plaintiff has not shown what is the fund which he now seeks to recover.

<sup>1</sup> Sayer, 84.

<sup>2</sup> Skinner, 447.



*Mr. Martin* replied.

THE LORD CHANCELLOR (LORD COTTENHAM) put the following questions to the Judges : —

"1. Whether the Reverend Edward Repton is entitled to recover from the treasurer of Queen Anne's Bounty the profits of the canonry or prebend to which he was appointed on 7th November, 1838, in the hands of such treasurer at the time of such appointment, being the net profits of such canonry or prebend for the period between the death of the last holder of such canonry or prebend and the appointment of the said Edward Repton his successor, from whatever source or fund such net profits may have arisen?"

"2. Whether the said Edward Repton is entitled to such part of such net profits, if any, as arose from property held in right of such canonry or prebend as the corpus belonging thereto?"

\*88 \* "3. Whether it sufficiently appears from the special verdict whether the 2952*l.* 0*s.* 2*d.* therein mentioned, or any part thereof, arose from property held in right of such canonry or prebend as the corpus belonging thereto, or from any other source?"

"4. Whether, if the Reverend Edward Repton was entitled to any part of the 2952*l.* 0*s.* 2*d.* in the hands of the treasurer of Queen Anne's Bounty at the time of his appointment, he is entitled to recover the same against the defendant in this cause upon the pleadings on the record?"

The Judges requested time to answer these questions.

1848. July 10.

BARON PARKE. — I think it most convenient to answer the first two questions proposed by your Lordships to her Majesty's Judges together. I have to state the unanimous opinion of those who heard the argument upon the case at your Lordships' bar that the plaintiff in error is entitled to recover from the defendant all the profits belonging to the canonry or prebend, to which he was appointed on the 7th November, 1838, in the hands of the defendant, as treasurer of Queen Anne's Bounty, at the time of the plaintiff's appointment, being the net profits of the separate estate or corpus belonging to such canonry or prebend, for the period between the death of the last holder of such canonry or prebend, and the appointment of the plaintiff in error as his successor, that

is, such profits as belong to the canon or prebendary as a corporation sole, but not any of the profits arising from property belonging to the corporation aggregate of the dean and chapter, unless it should happen that by the foundation of the church, or by prescription, the particular newly appointed canon \* or pre- \* 89 bendary may be entitled to a share of these profits, which would not properly fall under the description of a corpus.

The plaintiff in error claims the profits of his canonry or prebend, under the 5 & 6 Wm. IV. c. 30, § 2. Section 1 of that Act provides, after reciting the declaration of his Majesty, of the archbishops, and divers bishops and patrons, of their intention not to present to vacant preferments, and further that several prebends, canonries and benefices, without cure of souls, had become vacant since, and others might become vacant pending the inquiries then in progress, and that it was expedient that the same should remain vacant until it should be decided in what mode they could be disposed of so as to be made most conducive to the efficiency of the Established Church, and with that view reciting that it was necessary to provide that due care should be taken of the revenues of such dignities, prebends, canonries, and benefices, and that the right of presentation or collation thereto should not lapse by reason of delay in such presentation or collation, it was enacted, that where any dignity, prebend, canonry, or benefice, without cure of souls, being in the patronage of his Majesty, or of any archbishop, bishop, or other patron in England or Wales, had become vacant since the fourth day of February last, or should become vacant during the existence of the said commission, or of any renewal thereof, all profits and emoluments which have arisen or accrued, and which should arise and accrue, from every such vacant dignity, prebend, canonry, or benefice until a successor should have been appointed thereto, whether from houses, lands, tithes, or hereditaments to the same belonging, or from rents, fines, compositions, dividends, or other emoluments belonging

\* to any chapter or other aggregate body of which the digni- \* 90 tary, prebendary, canon, or incumbent last in possession was a member, should be paid to the treasurer for the time being of the governors of the Bounty of Queen Anne, in as full and ample manner as such dignitary, prebendary, canon, or incumbent, if he had remained in possession, or his successor, if duly appointed, inducted, or installed, would be entitled to receive the same; and

such treasurer should, for the purpose of enforcing payment of all such profits and emoluments, have and enjoy all legal rights, powers, and remedies, whether by action, suit, or distress, as the case may be, which would belong to such successor; and by the second section it was further enacted, that such treasurer should keep an account of all sums received by him under that Act, separate from all other funds in his hands, and distinguishing each dignity or benefice in respect whereof the same should be received, and should allow all costs, expenses, and outgoings which would have fallen on the deceased incumbent, or might be reasonably incurred in the receipt of or enforcing the payment of the sums received, the amount thereof being allowed by the governors of the said bounty for the time being, and should retain the balances in his hands until he should be otherwise ordered by competent authority.

We think it extremely probable that the legislature in framing this Act contemplated the appropriation of all the intermediate profits of the vacant canonry or prebend by a future enactment, and intended itself thereby to create the competent authority to dispose of the proceeds in the hands of the treasurer of Queen

Anne's Bounty, making him a sort of lay canon in the mean  
 \* 91 time. But this competent authority it did not \* give, until a new state of things had arisen, and the Statute 1 & 2 Vict. c. 108, enabling the Crown to appoint the plaintiff, had been acted upon by making that appointment. We think that he, when appointed, was placed in precisely the same situation as he would have been, had he been appointed by the Crown under the fourth section of the 5 & 6 Wm. IV. c. 30, which reserved the right of the Crown so to appoint; and before the subsequent restraining statute, 6 & 7 Wm. IV. c. 67, he would have been entitled to all the profits of the separate estate of the prebend under 28 Hen. VIII. c. 11; and such part, if any, of the profits received by the defendant as arose from that separate estate we think he might recover. We entirely agree in the judgment of the Court of Queen's Bench, and the reason assigned by Lord Denman for that judgment. The Court of Queen's Bench proceeded on the assumption that the profits of the canonry or prebend were those of the corpus to which the plaintiff would have been entitled under the Statute of Henry VIII.; and, on that assumption, we think the judgment was right.

But we are of opinion that he was not entitled to any part of

the profits of the estate of the corporation aggregate of dean and chapter, which that body paid over to the defendant, in pursuance of the Act 5 & 6 Wm. IV. c. 30. If these profits had remained in the hands of the dean and chapter, it does not appear on this record that the canon or prebendary would have been entitled to them under the Stat. 28 Hen. VIII. c. 11.

By that statute, he would have had an undoubted right to all the profits of the separate estate of the prebend or canonry, and also probably, to all the share of the joint profits, that he could show belonged of right and by the foundation of the church or by prescription to the newly appointed canon or prebendary. But \* the share of profits of the corporation aggregate, which \* 92 the members had a power to dispose of according to their will and pleasure, or which by the foundation or by prescription the aggregate body was bound to appropriate to the fabric of the church or any other prescribed purpose, would not belong to the newly appointed canon or prebendary. The latter point appears to be perfectly clear, independently of the authority of Godolphin (*Repertorium Canonicum* 52) and 2 Burn's Ecclesiastical Law, 92 (9th ed.). Does then the Act 5 & 6 Wm. IV. c. 30, make any difference? We think not. The corporation aggregate is bound by that statute (sec. 1) to pay to the treasurer of Queen Anne's Bounty, not merely the profits of the corpus of the canonry or prebend, but also that portion of the profits belonging to the aggregate body to which the former canon or prebendary, if he had remained in possession, would have been entitled.

It is contended that the part of the profits falling under the description was, by the payment to the treasurer, appropriated by the corporation aggregate to the canonry or prebend, in the same way as if the aggregate body had voluntarily made an addition by way of donation to that amount, to the canonry or prebend. In this we do not concur. The payment is made compulsorily by the Act of Parliament; and the obedience to the statute is no appropriation. The amount paid is made part of a fund thereby set apart and rendered subject to the provisions of the Act, and no more; and the right to it depends on the construction of those provisions.

In the answer to the fourth question also, all the Judges who heard the argument concur; and I have to state my opinion, that if the plaintiff in error was entitled \* to any part of the \* 93

2952*l.* 0*s.* 2*d.* in the hands of the defendant at the time of the plaintiff's appointment, he is still entitled to recover the same, notwithstanding the enactment of the Statute 3 & 4 Vict. c. 113. Supposing that the order of the commissioners pursuant to that statute, and the payment in obedience to it to the commissioners, would have constituted a defence, it would not be available under the general issue. The defence should have been pleaded specially.

As to the answer to be given to the third of your Lordships' questions, the Judges are not agreed, my brother Erle being of a different opinion from the rest of the Judges who heard the argument. I have to state therefore, that, in the opinion of all the Judges except my brother Erle, it does not sufficiently appear upon this special verdict, that the whole or any part of the 2952*l.* 0*s.* 2*d.* therein mentioned, arose from property held in right of such canonry or prebend as the corpus belonging thereto, or was a share of the profits of the estate of the aggregate body to which he, as newly appointed canon or prebendary, was legally entitled.

The finding of the jury is, that the treasurer of the governors of the Bounty of Queen Anne, in pursuance of the said statute passed in the 6th Will. IV. had since that time, and until the appointment of the plaintiff, received the profits of the said canonry or prebend, and that he had in his hands 2952*l.* 0*s.* 2*d.*, being the net profits of the said canonry or prebend for the period between the death of the predecessor of the plaintiff, and the appointment of the plaintiff his successor.

We all, except my brother Erle, think that the true construction of this finding is, that the defendant received that sum under the statute as the parliamentary fund set apart by that statute,  
 \* 94 and subject to its operation, \* being either the profits of the separate estate, or corpus, or the share of the profits of the aggregate estate, which the deceased predecessor would have been entitled to had he lived, or the newly appointed canon or prebendary would be entitled to, or a sum composed of all, some, or one of the said amounts.

On that construction the Court would not be justified in concluding that any part of that fund was the profits of the corpus, or such profits as the new canon or prebendary was in any way entitled to, being the only sum which the plaintiff in error had a

right to recover; nor, if it could so conclude, is the amount ascertained so that the Court could give a judgment for it.

But, at all events, it is uncertain whether the meaning of the finding is that which I have stated or not, and the uncertainty renders it impossible for the Court to give judgment upon it.

MR. JUSTICE ERLE. — It appears to me also that the answer to the first question of your Lordships should be in the affirmative. "The profits of the canonry or prebend" are an apt expression for the profits to which the holding of the canonry or prebend is a title, and are equivalent to the expression "profits belonging to the canonry or prebend," which by the 28 Hen. VIII. c. 11 are expressly given to the successor.

If the question assumes that the dean and chapter receive profits belonging to that corporation aggregate, and give portions thereof by division to individuals who for the time are prebendaries or canons, who, as such prebendary or canon, have no other legal right thereto than by the donation of the corporation aggregate, and that profits from this source were in the \* hands \* 95 of the treasurer of Queen Anne's Bounty, I beg to state that in my understanding they are not "profits of the canonry or prebend," and that the question does not extend to them for that reason.

I concur with the other learned Judges in the answer to the second question.

In answer to the third question, I have to submit to your Lordships, that it sufficiently appears from the special verdict that the sum here mentioned arose from property held in right of such canonry or prebend.

As in this answer I differ from the other learned Judges, I have to state to your Lordships the grounds of my opinion, and I will endeavour to do so with conciseness, and with that view will omit all reference to any point of the special verdict not relating to the present inquiry.

I would beg to premise, first, that the 28 Hen. VIII. c. 11, gives to the successor a right to profits from ecclesiastical as well as temporal sources, and, in respect of temporal property, a right to profits, whether accruing to the canonry severally or jointly, — in short, all profits to which the holding of the canonry is a title; and that I understand your Lordships' question to describe the

profits comprised within the 28 Hen. VIII. c. 11, where it mentions "property held in right of such canonry as the corpus thereof." I would also premise, secondly, that the Statute 4 & 5 Wm. IV. c. 30, gives to the treasurer of Queen Anne's Bounty a right to receive not only profits comprised within the 28 Hen. VIII. c. 11, but also profits to which the holding of the canonry may not be a title, namely, profits arising from divisions by the deans and chapters as before described, and which, if no vacancy \* 96 \* had occurred, the predecessor continuing in the canonry would have received.

I would beg attention to the context of the special verdict, which appears to have been framed for the purpose of raising this question of law; namely, whether the right to the profits given to the successor by 28 Hen. VIII. c. 11, was taken away by 4 & 5 Wm. IV. c. 30; and for the more clear and full statement of this question of law I would beg to refer to the report of this case in the 7th Queen's Bench Reports, 95.

If the special verdict is analysed with reference to this purpose, it will be found to contain both the facts which are essential to a verdict for the plaintiff, without which there would be no question for the jury; and also the facts essential for the defendant which raise the question of law above mentioned.

Thus it is found that the defendant received the "profits of the canonry" during the vacancy, that the plaintiff was the successor, and that the profits were money. Each of these facts is essential for the plaintiff, and, together, they would entitle the plaintiff to the verdict, unless answered. It is also found that the defendant, as treasurer of Queen Anne's Bounty, in pursuance of the Statute 5 & 6 Wm. IV. c. 30, received the profits of the canonry, and that the plaintiff demanded them in the manner set forth; and thus the question of law is raised on which the entry of the verdict is to depend. The amount of damages is added in case the Court should adjudge the verdict to be for the plaintiff; and for that purpose the amount of the net profits is stated, but in respect thereof no question is referred to the Court. This verdict was adjudge to be insufficient, because it did not find the nature \* 97 and \* source of the profits received. But I have to submit that their nature, and the source whence they are derived, are only material for deciding whether they are profits of the canonry or not, that the jurors may dispose of that question of fact,

if they choose, without referring it to the Court ; that they have done so ; and that the finding the profits received to have been " the profits of the canonry " is appropriate and decisive.

It is certain that the framers of the verdict must have intended to find that the profits received were profits within the provisions of the 28 Hen. VIII. c. 11 ; for unless that fact was established, the case for the plaintiff failed entirely, and there would be no question of law to be decided. They have used the words which are adapted to give effect to that intention ; and it is contrary to every rule to construe " profits of the canonry " to mean something different from profits of the canonry, when the context shows they were used in their proper sense.

Indeed the expression " profits of the canonry," so far from being liable to the objection of insufficiency, appears to me to be as clear and free from ambiguity as any which jurors could properly be supposed to use.

They would be going beyond their province, and be undertaking the construction of statutes, if they found the profits of the canonry to be such as came within the provisions of 28 Hen. VIII. c. 11, or if they found the profits to be profits of the canonry, and were to add that they did not include in this finding profits of which the receipt might be authorised by 5 & 6 Wm. IV. c. 30, but which are not profits of the canonry. And, if I may be permitted to compare the terms used in your Lordships' question with the terms used in the verdict, I submit, that the Statute 28 Hen. VIII. c. 11, \* might be construed to comprehend other \* 98 profits than those " from property held in right of a canonry as the corpus thereof " ; that this description, if clear to a legal mind, is more technical than is fitted for a jury ; that a direction to the jury in the terms of your Lordships' question would be open to exception on the part of the plaintiff as too restricted ; and that the terms of the present verdict would not be improved by exchanging them for the terms of the question.

The Court of Exchequer Chamber appears to have formed the opinion that the verdict was insufficient, because the finding is, that the defendant, " in pursuance of the Statute 4 & 5 Wm. IV. " received the profits of the canonry ; and as that statute extends to profits which may not be profits of the canonry, the Court inferred that the jury may have included under profits of the canonry what are not profits of the canonry.



But the attributing to the act of receiving, "that it was in pursuance of the statute," is not attributing any quality to the object received. The act of receiving may be qualified either in respect of the authority under which it is done, or otherwise; but the thing received is not therefore qualified or altered thereby. It was material and sensible to find that the receipt was in pursuance of the statute, because the question of law would not otherwise be raised; but to suppose therefore that the framers of the verdict meant to find that the profits were in pursuance of the statute, is to suppose what the language used does not authorise, and to impute a confusion for which there is no ground. The context is not wanted to fix the meaning of the term "profits of the canonry." Still, if the context is resorted to for this purpose,

\* 99 it tends to a conclusion \* opposite to that of the Court below; for the verdict recites the Statute of the 5 & 6 Wm. IV. c. 30, in part, before it finds that the receipt was in pursuance thereof; and the part recited relates to the profits of the canonry, and the part omitted relates to the other profits. This affords a presumption that the verdict was intended to be confined to the profits of the canonry, those alone being relevant to the question to be raised.

There remains one test to which I would refer, as showing the sufficiency of the present verdict. If the new trial be supposed to take place, and the defendant to prove that he received this money from the dean and chapter (the extrinsic fact which was suggested in the argument in the Exchequer Chamber), and the plaintiff to prove that, either by the endowment of the chapter or canonry, or by the statutes of the chapter, if they have received confirmation in Parliament, or by some other way, the dean and chapter were under legal obligation to divide and assign a share to each canonry, the question would be, Whether the sum so divided was "a profit of canonry"? If the jurors should dispose of it as fact, they will either affirm or deny that "it is a profit of the canonry." If they find specially the facts of title, the question for the Court will be the same. The new trial therefore will not be to remove an ambiguity in the present verdict, but to give the defendant an opportunity either to adduce fresh evidence or to have the effect of the former evidence reconsidered, and so to try whether the second jury will affirm that which the first jury affirmed. If I am right in suggesting that this would be the

course of a new trial, it shows that the endeavour is for a contradictory verdict, not for an explanatory finding, and so shows that the present \* verdict is sufficient. Therefore, both \* 100 because the meaning of the verdict can be gathered clearly from the language and from the context, and because the grounds of objection that have been assigned appear unfounded, I have felt obliged to give the answer before stated to your Lordships' third question.

My answer to the fourth question is the same as that of the other Judges.

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1850. July 5.

LORD BROUGHAM.—This case, which is no doubt a very hard one against the plaintiff in error, a prebendary of the neighbouring cathedral, was heard before your Lordships in the session before the last, when you had the valuable assistance of the learned Judges who have since delivered their opinions upon it. The Judges, who were nine in number, differed among each other. Eight, who agreed in opinion, delivered their opinion by Baron Parke, following a new arrangement which has been made of late years, when the Judges differ, if they do not differ very much. If there is a great number on one side and only one on the other, the opinions of the former are declared by one of their number. In this case Baron Parke was the senior Judge of those who agreed together, and instead of all the other Judges giving their opinions *seriatim*, according to the former practice, which was an inconvenient and cumbrous mode of proceeding, because where there was one Judge one way, and eleven the other, we had to hear twelve arguments, all necessarily on one side, and almost the same the one as the other; we now only hear the conflicting opinions.

Baron Parke delivered the opinions of the eight \* learned \* 101 Judges; Mr. Justice Erle gave a different opinion on one of the questions put to them.

This case originally came before the Court of Queen's Bench, and there was a decision given in favour of Mr. Repton, under peculiar circumstances, which, in justice to that Court, I am now about to state. It then went, by writ of error, to the Exchequer Chamber, where the judgment of the Court of Queen's Bench was reversed. A writ of error was then presented to this House,

and here the matter was fully and ably argued by very learned counsel. The learned Judges gave their opinions in this way. Baron Parke, on behalf of seven other Judges and himself, gave an opinion to your Lordships in favour of the judgment of the Court of Exchequer Chamber. Mr. Justice Erle gave his opinion to the same effect with the other judges upon three of the four points, but he differed from them upon one point, and that was the important point for Mr. Repton. Under these circumstances we were placed in this dilemma. We had to consider the opinion of the Court of Exchequer Chamber against that of the Queen's Bench, never more ably filled by Judges than it was at that moment. I found, in this state of things, one circumstance which greatly relieved my anxiety. I found that two of the learned Judges of the Court of Queen's Bench, Mr. Justice Patteson and Mr. Justice Coleridge, were present at the argument here, and that they changed their former opinions and joined in the affirmance of the judgment of the Exchequer Chamber.

This change of opinion was, no doubt, a manifestation of candour which might have been expected from any of the learned

Judges, but it was also to be expected that if they had  
 \* 102 changed their opinions they \* should make some remarks  
 on the causes of that change. As they have not done so,

but have merely concurred with the other Judges, I was led to inquire how the fact was, and it turns out that a great mistake took place in the Court of Queen's Bench in the manner of preparing the special case — for it was not a special verdict at first — but was turned into a special verdict, according to the leave usually given, before it went to the Exchequer Chamber. At that time a very important circumstance took place which throws great light upon the whole matter, and relieves me from all anxiety in now adopting the opinion of the majority of the learned Judges, and giving my judgment in favour of the reversal by the Exchequer Chamber of the decision of the Court of Queen's Bench.

Mr. Justice Patteson perceived that there was an omission in the case, and he pointed it out to the learned counsel engaged in arguing it. One question in the case was with respect to the construction to be put upon the Statute of Hen. VIII., but it was chiefly desired by the parties to have a construction put upon the modern Acts that affected the subject matter in dispute. Then it was that Mr. Justice Patteson felt that the statement of the case was defec-

tive, for it did not show whence the profits in question (the whole was a question of profits), whence the profits of the prebend were derived, whether they were part of the general funds of the chapter, or whether they belonged to the corpus of the particular prebend held by Mr. Repton, if there was such a corpus, but which Mr. Justice Patteson was quite aware there was not, and that might make a great difference, said he, with respect to the Statute of Hen. VIII. The learned counsel for the defendant, Mr. Hodgson, answered, "We do not mean to \* raise that point, \* 103 we want the construction to be put on the modern Acts as to suspending the filling up of the stalls at Westminster for the chaplains of the House of Commons," and so forth. "We admit," said Sir Frederick Thesiger, who was counsel for Mr. Hodgson, the present defendant in error, "we admit, for the purpose of this case, that but for these modern Acts the profits would have belonged to Mr. Repton, under the Statute of Hen. VIII.

Now, Mr. Justice Patteson takes some blame to himself, or rather to the Court, and, I think, justly, for not insisting on the case being exclusively decided on the construction of the modern Acts, and for not expressly in the judgment noticing that the other point was admitted by the counsel for Mr. Hodgson. This, however, was not done, and the case was then turned into a special verdict, and then it went to the Court of Exchequer Chamber, where a great part of the argument turned upon the point which had been defectively stated in the case at the time of the argument in the Court of Queen's Bench. In the Court of Exchequer Chamber it was thought that the special verdict was defective for not stating whence the profits arose, and a *venire de novo* was therefore awarded, and with that opinion I entirely agree. I think that the verdict was defective in that respect, and that it ought originally to have stated that matter, or ought to have been amended when that defect was first discovered and pointed out. The first question put to the learned Judges here was, "Whether Mr. Repton was entitled to the net profits of the prebend, from whatever source or fund such profits may have arisen"; but the second question speaks of such net profits as constituting the corpus of the prebend, and the third question asks whether it \* sufficiently appears, on the face of the special verdict, \* 104 that the property claimed, or any part of it, was held in right of the prebend as the corpus belonging thereto. Now the

facts stated in the special verdict do not enable us to answer these questions. Under these circumstances, I need not go into the whole question argued at this bar. It is sufficient for me to say, that if that point had been raised in the Court of Queen's Bench upon the Statute of Hen. VIII., instead of being abandoned by Sir Frederick Thesiger, Mr. Justice Patteson at once says that he should have had no doubt, nor would the rest of the Court have had any doubt whatever, in deciding against Mr. Repton. That is the statement which Mr. Justice Patteson makes, and it is most valuable, for it removes all anxiety from my mind, because it now appears that there is no real difference between the two Courts upon the construction of the statutes, but that the point decided in the Court of Exchequer Chamber never was raised, that is, not contentiously raised, in the Court of Queen's Bench.

I have, therefore, no hesitation in saying, that, with the exception of the difference of opinion on the part of Mr. Justice Erle, there is no difference of opinion amongst the learned Judges. My mind goes entirely with them. I agree with the judgment of the Court of Exchequer Chamber, and with what would have been the judgment of the Court of Queen's Bench, had the point been raised as it ought to have been, before that Court disposed of it. I therefore have no hesitation in recommending your Lordships to affirm the judgment of the Court of Exchequer Chamber. I do so with the greatest reluctance and pain on account of Mr. Repton; it

is a hard case upon him. There has been a great error committed by the mode in which the Act of Parliament \* —

one of the modern Acts — has been drawn up. It is clearly contrary to what was the intention of the framers of that Act, that it should have been so drawn up. Mr. Repton has been the victim, to a large amount, of this blundering legislation, upon a most important subject, and I cannot help entertaining the hope that substantial justice will be done to that reverend and most excellent person, and that he will be compensated, as he ought to be, out of the proper fund, for what he has lost by the errors of others, and not by his own fault. Considering the hardship of the case, I shall say nothing about costs at present. It is a case of peculiar hardship. I never knew a harder case, and Lord Lyndhurst entirely agrees with me. He has looked into the case, and he thinks it the hardest that ever came before him, judicially or otherwise. The case was, as Mr. Justice Patteson states it in his letter [Mr. Hugh

Hill, one of the counsel, representing the commissioners, being present at the judgment, assented], and I shall not fail to represent the circumstances in the proper quarter. There is no blame attaching to the counsel for Mr. Hodgson in the Queen's Bench, for there the object was to obtain a decision on the construction of the modern Acts of Parliament, but the consequences of what then occurred have been very hard on Mr. Repton.

*Judgment of the Court of Exchequer Chamber affirmed.*

1849. March 6, 8, 12. 1850. July 9.

SOPHIA BAKER, Widow, *Appellant*.

MARTIN TUCKER and another, *Respondents*.

*Devise. Construction. Implication.*

A. devised lands in trust for J. B., a reputed son, for his life, and, after his decease, for and to his first and every other son successively in tail male, and in default of such issue to his daughter or daughters, to hold to them, if more than one, and their heirs, as tenants in common; and, in default of issue of the said J. B., to and for the testator's right heirs:—

*Held*, that J. B. took only an estate for life, and that no remainder in tail to him could be implied after the limitation to the daughters.<sup>1</sup>

*Blackborn v. Edgley*, 1 P. Wms. 605, questioned *arguendo*, *infra*, at p. 120.

THE question in this appeal related to the construction of a devise of real estates contained in the will of Henry Baker, Esq., late of the Farm, in the county of Kilkenny. By that will, dated in April, 1821, the testator gave and devised all his estates and property in lands, of what nature or kind soever, and all his personal property of every kind, to Charles Kendal Bushe, Esq., his heirs, executors, administrators, and assigns, upon the following trusts: first, as to his personal estate, to pay thereout all his debts and legacies, and pay the residue, if any, to the testator's reputed son, John Baker, his executors, administrators, and assigns; and, as to his real, freehold, and chattel or other property in lands, in trust, in the first place, to raise and pay thereout such

<sup>1</sup> See *Roddy v. Fitzgerald*, 6 House of Lords Cases, 823, 831; *Parker v. Tootal*, 11 House of Lords Cases, 143, 148, 153.

of his debts and legacies as his personal property, if deficient, should be insufficient to discharge; and, secondly, to raise and pay thereout two annuities of 50*l.* each to the testator's two

\*107 reputed sons, Henry Baker \*and Arthur Baker, during their respective lives. The will then proceeded thus:—

“And, subject to the above-mentioned charges for debts, legacies, and annuities hereby charged upon the same, I declare that the above devise of all my several properties in lands is in trust for, and I hereby devise the same to, my above-mentioned reputed son John Baker for and during the term of his natural life, and, from and after the decease of the said John Baker, for and to the first and every other son of the said John Baker lawfully issuing, according to seniority of age and priority of birth, in tail male, and, in default of such issue, to the daughter or daughters of the said John, to hold to them, if more than one, and their heirs, as tenants in common, and not as joint tenants, and in default of issue of the said John Baker, to and for my own right heirs for ever.”

Powers were in the will given to the said John Baker, when in possession of the said estates, to charge them with any yearly sum not exceeding 300*l.* as a jointure for such wife as he might marry, and with any sum not exceeding 2000*l.*, as a provision for the younger children of the marriage, and also to make leases of the whole or any part thereof, in possession and not in reversion, at the best improved rents, without fine or other consideration, for a term not exceeding three lives or thirty-one years.

The testator died in May, 1822, without legitimate issue, leaving the reputed children in the will named, surviving, and also the respondent Martin Tucker, his nephew and heir at law.

Upon the testator's death, John Baker, as his devisee, entered into possession of the freehold estates. In October, 1825, \*108 he married the appellant, and by the settlement \*made on the occasion, he charged the devised estates with a yearly sum of 300*l.* for her, and with the sum of 2000*l.* for the younger children of the marriage.

There was no issue of the marriage.

In February, 1844, John Baker executed and enrolled a disentailing deed, under the Act for Abolishing Fines and Recoveries,<sup>1</sup>

<sup>1</sup> 4 & 5 Wm. IV. c. 92 (Irish).

reciting that he was seised under the said will of an estate for life, with remainder to his first and other sons in succession in tail male, with remainder to his daughters and their heirs; with remainder to himself in tail general; and he thereby consenting thereunto as protector to the settlement creating the said estate tail, conveyed the devised estates, of which he was then tenant in tail as aforesaid by virtue of the said recited will, to a trustee, to the use of himself in fee.

John Baker died in December, 1845, without issue, having by his will, dated in March, 1844, left all his freehold property and other property to the appellant for ever. She accordingly entered into possession of the freehold estates devised by the will of the original testator, as devisee in fee thereof under John Baker's will.

In March, 1846, the respondent Tucker filed his bill in the Court of Chancery in Ireland against the appellant and others, including the other respondent, the administrator of Henry Baker's estate, left unadministered by John Baker. The bill — after stating to the effect above stated, and charging that, although the personal estate of Henry Baker was more than sufficient to pay his debts and legacies, his executor, John Baker, did not pay them, nor other charges affecting the real estates — insisted that the \*disentailing deed was inoperative, and void as against the \*109 heir at law of Henry Baker; that no other or greater estate than an estate for life was by his will given to John Baker; and that, even if he had been tenant in tail, still the deed would be inoperative for barring the estate tail, and remainders expectant thereon, inasmuch as no proper protector of the settlement was joined or consented thereto. The bill prayed that the trusts of Henry Baker's will as to his real estates might be carried into effect; that accounts might be taken of his real and personal estates, and of his debts and legacies; that the personal estate might be applied in due course of administration in exoneration of the real estates; that the respondent might be declared entitled to the real estates in fee simple, and to the rents and profits thereof received by the appellant since the death of John Baker, subject to the annuities given by Henry Baker's will, in accordance with the trusts thereof.

The appellant by her answer said she believed there were judgment debts to the amount of 2000*l.* or more charged on the real



estates, and assigned to John Baker, still unsatisfied, and she claimed under his will to be at all events entitled to them, and also to the jointure of 300*l.* a-year under her marriage settlement. She also claimed to be entitled to the fee and inheritance of the real estates by virtue of the disentailing deed and the will of John Baker.

The Lord Chancellor of Ireland, having heard the cause, made a decree, declaring that upon the true construction of the will of Henry Baker, John Baker was entitled to his real estates for his life only, and to no greater estate, and, on his death without issue, the respondent became entitled to them in fee,  
 \* 110 and to the \* rents and profits thereof, as heir at law of the testator, subject to the unpaid debts, legacies, annuities, and charges in the will mentioned, and also to the appellant's jointure. And his Lordship referred it to the Master to take the accounts prayed for by the bill; and he declared that the personal estate of the testator ought to be applied in payment of his debts and legacies, in exoneration of the real estates.<sup>1</sup>

The appeal was against that decree.

*Mr. Humphry* and *Mr. J. V. Prior*, for the appellant.

The question here is, whether, upon the true construction of Henry Baker's will, his reputed son and devisee, John Baker, was entitled to an estate tail, either in possession or remainder, in the devised estates. If their Lordships should be of opinion that he took either of these, there could be no doubt that by the disentailing deed he acquired the fee and inheritance in the estates, and that by his will they passed to the appellant. The question turns on the effect of the limitations to the first and other sons of John Baker in tail male, and in default of such issue, to his daughters and their heirs, as tenants in common, and "in default of issue," not such issue, but issue generally of John Baker, — the event which happened, — to the testator's right heirs for ever. The appellant submits that the words "in default of issue" must be construed in their simple and literal sense to mean a general failure of issue; the respondent, the heir at law of the testator, contends that the words do not mean a general failure of issue, but that issue must be restricted to such issue as was before mentioned.

\* 111 \* The limitations in this will are similar to those con-

<sup>1</sup> 11 Irish Eq. Rep. 104.

tained in the settlement of Peter Daly, which was recently much considered by their Lordships in the case of *Cole v. Sewell*.<sup>1</sup> It is immaterial in point of construction whether the question arises in a will or deed, except that in a deed there cannot, it is said, be any estate raised by implication; but the rules of construction for ascertaining the intention of the authors of the instruments are the same in both respects. In *Cole v. Sewell*, their Lordships did not resort to any construction inconsistent with the rule requiring effect to be given to the whole instrument, *ut res magis valeat quam pereat*.

It is, in the first place, quite clear on the face of this will, that the testator intended to provide for the whole issue of John Baker, but the express limitations do not exhaust the whole issue, the daughters of John Baker's sons being omitted, and without any provision for them, which the testator could not have intended; so that to effect his object an immediate estate tail, or an estate tail in remainder in John Baker, after the limitations to his sons and daughters, must be implied, so that the estates may pass through his whole issue before the gift over to the testator's right heirs takes effect; because otherwise, if John Baker had sons, and no daughters, and his sons had female issue only, that issue could never take the estates under the express limitations of the will, — a result which the testator could not have intended.

The Lord Chancellor of Ireland, in his judgment, said that the express limitations fully manifested the testator's intention, and left no room for implication; and \* his Lordship \* 112 in conclusion observed, that whatever doubt he might have if the question were an open one, he was concluded by the authorities, especially the case of *Blackborn v. Edgley*;<sup>2</sup> and his Lordship offered the appellant to send a case for the opinion of a Court of Law, which she declined, preferring to bring the question at once for the decision of this House. The offer, however, indicated what his Lordship's decision would probably be, had he not considered himself fettered by the cases cited before him. It became, therefore, material to show that his Lordship fell into error in respect of some of the cases on which he relied most: such as *Turke v. Frencham*<sup>3</sup> and *Blackborn v. Edgley*. The former, which is reported in Dyer, and in Anderson, and also in Bendloe, was cited by

<sup>1</sup> 2 House of Lords Cases, 186.

<sup>2</sup> 2 Dyer, 171.

<sup>3</sup> 1 P. Wms. 600.

his Lordship from the incorrect report of it in Anderson, and was consequently led into error of the grounds of the decision. The devise there was to C. Frencham and the heirs male of his body, and if he should die without heirs of his body, remainder to A. Frencham and to his heirs male in fee, and for lack of heirs male, remainder over. C. Frencham had a daughter, and no son, and the question was whether she could take under the general words, "if he (C. Frencham) should die without heirs of his body." The Court held that she could not; that these words only gave an estate in special tail male, "for the intent of the devisor," as stated in Dyer's report, "appears expressly by his subsequent words." By these subsequent words, showing the devisor's intention to limit his gift to males only, that case was distinguished from the present case. And so also was *Blackborn v. Edgley*.

\* 113 \* In *Blackborn v. Edgley* there was a devise to Hewer Edgley for life, without waste, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his daughters in tail general, as tenants in common, &c. and if Hewer Edgley should die without issue, then over. The question was, whether, by virtue of the latter words, H. Edgley took an estate tail by implication; and it being contended in the argument that the words of implication could not destroy an express estate for life, "the Court," as the report states,<sup>1</sup> "exploded the notion that words of implication should not turn an express estate for life into an estate tail," as held in *Bamfield v. Popham*,<sup>2</sup> "and said, that if I devise an estate to A. for life, and after his death without issue, then to B., this will give an estate tail to A., according to *Sonday's Case*."<sup>3</sup> But here being a limitation upon H. Edgley's death to his sons, and after to his daughters, the following words, "if H. Edgley should die without issue," must be intended, "if he should die without such issue"; and then followed the reasons, founded on the words used and on the circumstances of the testator, that he did not intend to give H. Edgley an estate tail. The decision, according to the report, proceeded on the ground that the dying without issue did not mean issue generally, but referred to issue in the restricted sense before mentioned; and to carry out the intent, the word of reference was supplied. That case, therefore, and all those that fol-

<sup>1</sup> 1 P. Wms. at p. 605.

<sup>2</sup> 9 Rep. 227 b.

<sup>3</sup> 1 P. Wms. 54.

lowed it, by supplying referential words, to carry out the intention, were, as Lord Cottenham showed in *Ellicombe v. Gompertz*,<sup>1</sup> \* as was that case also, decided on the special words and \* 114 circumstances of each case; as *Ginger v. White*,<sup>2</sup> *Goodright v. Dunham*,<sup>3</sup> *Morse v. Lord Ormonde*,<sup>4</sup> *Malcolm v. Taylor*.<sup>5</sup> The referential construction is applied in cases where there is no chasm, where the gift is to all the children, or, which is equivalent, to all the sons and all the daughters. In such cases the word "issue," in the gift over, is restricted to the issue before mentioned.

There is a chasm in this devise, there being no provision for the daughters of the sons of the devisee, whose estate therefore, in order to supply that omission, must be enlarged into an estate tail, either immediate or in remainder. And that is effected by simply taking the words "in default of issue of the said John Baker," to mean issue generally. It may be argued that to give him an immediate estate tail in possession would be, in effect, to defeat the estate in fee, limited to his daughters, and *Doe v. Gallini*<sup>6</sup> supports that argument. But that case, on the other hand, and many cases which preceded it, are strong authorities for a construction which would give John Baker an estate tail in remainder, after the limitation to the daughters. The appellant does not ask to displace any of the prior limitations, but that a remainder in tail, on failure of those, may be raised by implication in John Baker.

The case of *Doe v. Halley*<sup>7</sup> is quite in point. There, under a devise for life to M. H., without impeachment of waste, remainder to his eldest son and the \* heirs of such son, and \* 115 in default of issue male of M. H. then to S. B., M. H. was held to take first an estate for life, with remainder to his eldest son in tail, with, remainder to himself in tail. Lord Kenyon there said, it was evidently the devisor's intention that all M. H.'s sons, and their sons, should take before S. B. and his issue, and then referring to the long debated case of *Robinson v. Robinson*,<sup>8</sup> he said that it was thereby established, that in the construction of a will

<sup>1</sup> 3 Mylne & Craig, at p. 152.

<sup>2</sup> Willes, 348.

<sup>3</sup> Douglas, 264.

<sup>4</sup> 5 Maddock, 99; 1 Russell, 382.

<sup>5</sup> 2 Russell & Mylne, 416.

<sup>6</sup> 5 Barnewall & Adolphus, 621, and 3 Adolphus & Ellis, 340.

<sup>7</sup> 8 Term Rep. 5.

<sup>8</sup> 1 Burrow, 88.

the general intent of the devisor must be looked to, and effect given to that, at all events; and on the case immediately before the Court he said: "We have our choice of two constructions to effectuate the devisor's general intent; either to give an immediate estate tail to M. H., which would violate the particular intent of the devisor, or to say that M. H. took an estate for life only, remainder in tail to his eldest son, remainder in tail to the father (M. H.), in order to let in all his issue male." And to that latter construction his Lordship said he inclined; and Mr. Justice Ashurst and the whole Court agreed in the reasoning on the general intention, that M. H. took an estate tail in remainder by implication, and that the cases of *Bamfield v. Popham*,<sup>1</sup> and *Loddington v. Kime*,<sup>2</sup> did not militate against that decision, and that it was supported, not only by *Robinson v. Robinson*, but also by *The Attorney-General v. Sutton*,<sup>3</sup> *Langly v. Baldwin*,<sup>4</sup> and *Allanson v. Clitherow*.<sup>5</sup>

\*116 The four last-mentioned cases, and also *Stanley v. \* Leonard*,<sup>6</sup> and *Parr v. Swindels*,<sup>7</sup> were stated, and urged as strong authorities in support of the argument for the appellant. The following cases also were cited: *Scott v. Scott*,<sup>8</sup> *Lewis v. Waters*,<sup>9</sup> *Bristow v. Boothby*,<sup>10</sup> *Tenny v. Agar*,<sup>11</sup> *Edwards v. Allison*,<sup>12</sup> *Jesson v. Wright*,<sup>13</sup> *Mortimer v. West*,<sup>14</sup> *Graves v. Hicks*,<sup>15</sup> *Franks v. Price*,<sup>16</sup> and *Tarback v. Tarback*.<sup>17</sup>

In the case of *Langston v. Langston*,<sup>18</sup> in this House, the Lord Chancellor (Lord Brougham), moving the judgment, said: "There are two modes of reading an instrument; when the one destroys and the other preserves, it is the rule of law, and of equity following the law in this respect — for it is a rule of common sense — that you should rather lean towards that construction which preserves, than towards that which destroys. *Ut res magis valeat quem pereat*, is a rule of common law and common sense, &c., and according to that rule, to supply, if you can safely do it, that

<sup>1</sup> 1 P. Wms. 54.

<sup>2</sup> 1 Salk. 224.

<sup>3</sup> 1 P. Wms. 754.

<sup>4</sup> 1 Eq. Cas. Abr. 185.

<sup>5</sup> 1 Ves. Sen. 24.

<sup>6</sup> 1 Eden, 87.

<sup>7</sup> 4 Russell, 283.

<sup>8</sup> 1 Eden, 458.

<sup>9</sup> 6 East, 336.

<sup>10</sup> 2 Simons & Stuart, 465.

<sup>11</sup> 12 East, 253.

<sup>12</sup> 4 Russell, 78.

<sup>13</sup> 2 Bligh, 2.

<sup>14</sup> 2 Simons, 274.

<sup>15</sup> 5 Adolphus & Ellis, 38.

<sup>16</sup> 3 Beavan, 182.

<sup>17</sup> Cited, 2 Jarman on Wills.

<sup>18</sup> 2 Clark & Finnelly, 194; see p. 243.

which he (the author of an instrument) *per incuriam*, omitted, and that which, instead of destroying, preserves the instrument, which, instead of defeating the intention of the maker, tends rather to continue and give effect to that intention." That is the mode of construction which ought to be applied in this case. The intention of the testator to provide for all the issue of John Baker is manifest, and that intention can be applied, and the whole will and \*all the limitations preserved by raising, \*117 by implication, an estate tail in remainder in John Baker.

A devise to one and his issue is an estate tail in the first taker ; why should not a devise to one for life with limitations to certain of his issue, and if he should die without issue, give him a remainder in tail ? There can be no difficulty in implying a remainder in tail in the tenant for life. The second rule of construction laid down by Mr. Jarman, in his treatise on Wills,<sup>1</sup> is not fairly deducible from the cases, and would, if adopted without qualification, lead to the defeating of testators' intentions. The case of *Blackborn v. Edgley*, from which he deduced the rule, is not fully or accurately stated in the report.<sup>2</sup>

In the present case, the general intent was clearly in favour of the appellant's claim, and there was no opposition of the particular intent. None of the cases was opposed to the claim, and many of them were in support of it, but, without relying on any of them, their Lordships would find in the plain reading of the will sufficient grounds for the construction that John Baker took an estate tail.

*Mr. Turner* and *Mr. Wickens* for the respondent : —

The simple reading of the limitations in this devise shows the intention of the testator, and suggests of course the proper construction without reference to any cases. The construction contended for on behalf of the appellant is, that the limitation to John Baker's daughters and their heirs may be so read that the estate in fee simple, thereby clearly given to them, may be cut down to an estate tail, in order to raise by implication \*an estate \*118 tail in remainder in the tenant for life. There is no precedent for that construction. Many of the cases that have been cited have no bearing on the question, and those that have, go to support the judgment of the Court below. The first construction

<sup>1</sup> Vol. II. p. 393.

<sup>2</sup> Vide *infra*, pp. 120, 121.

suggested on behalf of the appellant was to give John Baker, in default of issue, an immediate estate tail in possession, which would destroy the limitation to the daughters; but that appears to be now abandoned. It was evidently the intention of the testator to give John Baker an estate for life, and no greater estate. Had he issue a son, or sons and daughters, the son, tenant in tail, coming into possession, might bar the entail and remainders, and provide for the succession of daughters as well as sons, so that the chasm in Henry Baker's will, omitting to provide for the female issue of John Baker's sons, could not have the lamentable effects which were made the grounds of the appellant's argument. The like argument in *Blackborn v. Edgley* was, in the same way, displaced by Lord Macclesfield, saying it did not appear that the testator intended H. Edgley's son's daughters should take, &c.; "besides the son of H. Edgley would be tenant in tail, and, when of age, might, by docking the entail, give the premises to his daughters." But it has been suggested that the report of that case required explanation; and it has been proposed also to modify the second rule of construction deduced by Mr. Jarman from an examination of that and other cases; the effect of which would be, that whatever might be the limitations in a will, if there should be a chasm in any line in which the estate would be limited, the words "in default of issue" should have a referential construction.

The intention of the testator is the true rule of construction in *Blackborn v. Edgley*, \* and in all the cases founded on it, and to overturn or shake that case would upset a vast number of decisions, and endanger the titles of many families. There are, no doubt, cases where the Courts, to carry out the intention, supplied a chasm or omission in a will by construction, and implying an estate tail, or remainder in the first taker for life; as in *Stanley v. Lennard*,<sup>1</sup> where the true grounds of the decisions in that class of cases, and in *Blackborn v. Edgley*, are explained. The previous case of *Turke v. Frencham*, whether read in Dyer's or in Anderson's Reports, is a strong authority for holding John Baker to have taken only an estate for life. There are numerous recent cases, as *Morse v. Lord Ormonde*,<sup>2</sup> *Malcolm v. Taylor*,<sup>3</sup> *Elliscombe v. Gompertz*,<sup>4</sup> *Mortimer v. West*,<sup>5</sup> *Tarbutch v. Tarbutch*,<sup>6</sup> *Hillers-*

<sup>1</sup> 1 Eden, 87.

<sup>2</sup> 5 Maddock, 99; 1 Russell, 382.

<sup>3</sup> 2 Russell & Mylne, 416.

<sup>4</sup> 3 Mylne & Craig, 127.

<sup>5</sup> 2 Simons, 274.

<sup>6</sup> 2 Jarman on Wills, 375.

*don v. Lowe*,<sup>1</sup> *Eno v. Eno*,<sup>2</sup> and many others, all following the rule of construction deduced from *Blackborn v. Edgley*, which is not affected by *Doe v. Halley*, itself a leading case of a different class; nor by the other cases of contingency or implication that have been cited. *Doe v. Gallini*,<sup>3</sup> *Parr v. Swindels*,<sup>4</sup> and *Franks v. Price*<sup>5</sup> are clearly distinguished from this. *Doe v. Halley* and *Blackborn v. Edgley* are in the two extremes, and the decisions easily reconciled; between them lies wide debatable ground. The construction of the present devise is clear on the mere words of limitation, and it is unnecessary to encumber or complicate it by reference to cases.

\* *Mr. Humphry* in reply, said the scope of his former \*120 argument was that an estate tail in remainder was created by implication in John Baker. To that his learned friends opposed the authority of *Blackborn v. Edgley*, and the second rule of construction deduced from it by Mr. Jarman in his very able work on Wills, urging that if the authority of that case, whether well or ill decided, were impeached by their Lordships, the titles of numerous families to their estates would be endangered. In Mr. Jarman's book, in which the case of *Blackborn v. Edgley* was referred to as the foundation of his second rule of construction, were contained many passages, from which it was evident he did not consider that case so essentially necessary to sustain existing titles. The rule itself was of modern origin, purporting to be a deduction from the cases, by a living writer. No such rule was noticed by any other law writer, — not by Fearn, or Hargreave, or Powell, or Preston, nor in that useful compendium of the law of real property by Mr. Burton. The doctrine of implication of estates was not known — certainly not established — at the date of *Blackborn v. Edgley*.

The new cases referred to on behalf of the respondent did not support the argument, and in none of them was the case of *Blackborn v. Edgley* relied on. Extracts have been made from the registrar's book, and would be given in to their Lordships, to show the inaccuracies in the report.<sup>6</sup> The decree, dated 23d March, 1719, is in the registrar's book of that year, folios 445, &c. The

<sup>1</sup> 2 Hare, 355.

<sup>2</sup> 6 Hare, 171.

<sup>3</sup> 3 Adolphus & Ellis, 340.

<sup>4</sup> 4 Russell, 288.

<sup>5</sup> 3 Beavan, 182.

<sup>6</sup> 1 P. Wms. at p. 605.



words used are heirs male of bodies of sons, heirs of bodies  
 \*121 of daughters (not tail male or tail general). \*The disposition over is: "And in case the said Hower Edgley should die without leaving issue behind him, or if such issue should happen to die without issue of their respective bodies, then his will was that his said real estate, and the estate to be purchased with his personal estate, should be so settled, that in case his kinswoman, Ann Edgley, should be then living, then that she should enjoy the rents of his whole estate for her life, and, from her decease, one-fourth part thereof was to be enjoyed by the plaintiff William Blackburn, his heirs and assigns; one other one fourth by the plaintiff Abraham Blackburn, his heirs and assigns; another one fourth by the plaintiff Ann Jackson; and the other one fourth by Susanna Edgley, the younger daughter of the said Ann Edgley, her heirs and assigns."

The prayer of the bill was (*inter alia*) "to account for personal estate and rents, and settle and convey the manors and lands the said testator died seised of, according to the directions of his will; to take account of annuities charged on the estates, &c. or personal estate appropriated, &c.; to take accounts of debts and legacies, and residue of personal estate be laid out in lands, to be settled accordingly as directed by the will; and to have the direction of the Court touching the testator's will and the matters aforesaid, is the scope of the bill."

The decree was (*inter alia*) "and that if any other matters shall seem difficult, he (the Master) do report the same specially to the Court for further directions thereon, and what upon account, &c. appear to amount unto, is to be laid out and invested in one or more purchases of land, by and with the approbation of the said Master; and when such purchase or purchases shall be made, it is further ordered and decreed, that the lands so purchased, or a sufficient part thereof, be charged and made  
 \*122 \*liable to the payment of the said charity of six pounds a-year to the schoolmaster of Clapham and his successors for ever, according to the directions of the said will; and that the said Master do see the same done accordingly, and subject thereto, that the lands so purchased, and also the testator's real estate, be settled according to the testator's will, and in case the parties differ about such settlement, the said Master is to see the same made, pursuant to the said will, but in regard the said Susan Edgley is

dead, his Lordship declared that the one-fourth part of the estate in question, which was to have been limited to her in case of Hewer Edgley's not having sons or daughters living at his death, ought to go to the said Hewer Edgley, her brother and heir, and to his heirs; but before such settlement is to be made, proper care is to be taken to indemnify the trustees against any demand from the Crown, and the parties are to be at liberty to apply to the Court in relation thereto, as occasion shall require, &c. And it is further ordered, that all parties, plaintiffs and defendants in these causes, have their costs of these suits, to be paid out of the trust estate."

It was clear from these extracts that the case was no authority for Mr. Jarman's second rule. Let that be rejected or modified, and the principle of construction would be comparatively simple and of easy application, and in itself reasonable and uniform. The following would perhaps be an acceptable modification of the rule:

"Whenever the prior limitations are to all the children in fee, — leaving, therefore, nothing to be disposed of, — or in tail, so as effectually to dispose of the estates under every state of circumstances antecedent to that designated by the primary meaning and ordinary interpretation of the words of the gift over (independently \* of events happening prior to the testator's \* 123 decease, which, it is supposed, he can himself provide for) they would be held properly, almost, indeed, of necessity, referential only; but, in every case where any chasm of events occurs between the actual limitations to the children and that upon which the gift over is made to depend (not referable in point of time to the life of the testator), an estate tail in remainder in the present tenant for life, whose issue is referred to in the gifts over, would be implied to fill up such chasm."

Such, indeed, seems to have been the true principle upon which the cases (with the exception of *Blackburn v. Edgley*, if that cannot be referable to special circumstances), and particularly the late cases of *Doe v. Halley*, *Doe v. Gallini*, *Parr v. Swindels*, &c. have proceeded. And surely it is much better that the rule and its application should depend upon, whether or not the prior dispositions thus comprehended in their range all the objects which the gift over contemplates as having failed, a plain and simple fact, than that it should depend upon so varying and unsatisfactory a

state of circumstances as their comprehending such objects, to some greater or less extent. If a restrictive intention can be collected from the whole of the will, a restrictive interpretation will be applied accordingly, as in *Ellicombe v. Gompertz, &c.* But if there be nothing from which it can be properly inferred, the words of the gift over, which seems there to be the proper and legitimate source for implication, would be left to their primary and legal import and operation; thus effecting the general intention of the testator, and that too without involving the sacrifice of any particular intention, or the departure from any acknowledged rules or principles of construction.

The case stood over for consideration.

July 10.

\*124 \*LORD BROUGHAM. — I have to call your Lordships' attention to the very able and elaborate argument in this case, last session, when my noble and learned friend (Lord Cottenham), not now present, held the Great Seal, and at which I attended at the close of the argument, in consequence of the importance of the question, more than from feeling any great doubt as to the conclusion at which we ought to arrive. My noble and learned friend and myself, at least that is my present recollection of the matter, thought that it would be better to postpone finally disposing of the question.

The case arose out of a devise to John Baker for life, remainder to his first and other sons in tail male, and in default of such issue, to the daughter or daughters of John Baker, and if more than one, to them as tenants in common, and in default of issue of John Baker, then over to the right heirs of the testator. There were powers of jointuring given to John Baker, and of providing portions for younger children, and powers of leasing.

Now the first observation that arises upon the structure of this will is, that the word "such" occurs in the limitation, after that to John Baker's first and other sons in tail male, "and in default of such issue" then the daughter or daughters are let in; but the limitation over, upon which the case turns, is "in default of issue" generally, to the testator's right heirs. It must be observed that this word "issue" may be taken as if it had been preceded by the word "such," because it is clear that the testator first gave the property to the first and other sons in tail male, and then, in

default of such issue, to the daughters. Having by that gift given it to the daughters, he then says, "and in default of issue," which means the whole issue, first, the issue of the sons, secondly, the issue of the daughters; and in \* the latter case, in de- \* 125 fault of the second, he gives it as if it had been "such issue," which would be the last. Therefore little will turn on the consideration of the case upon that point.

Now I take it to be clear, that a gift over may affect the preceding gifts, if the words used are inconsistent with those preceding gifts taking effect according to the terms used in describing them. But in this case it appears to me that there is no such inconsistency as to let in that modification from the terms of the gift over to the terms of the preceding gifts. All the children of John Baker are provided for, first, the sons, then the daughters, and then in default of issue — not on failure of issue, but for want of such issue — to the testator's right heirs: that is to say, if the prior gifts do not take effect; whereas, if we adopt the appellant's construction, the gift in tail male to sons must be enlarged to an estate tail general, to let in daughters of sons, and the fee to daughters must be cut down to an estate tail, in order to give effect to the gift over.

Now the construction, which I think the words naturally and strictly bear when duly weighed is entirely in accordance with the current of the decided cases. I shall not notice more of those cases upon this occasion than appears to me to be absolutely necessary, some of them being really, I might almost say, on all fours with the present case. They are illustrated by such a case, for instance, as *Turke v. Frencham*.<sup>1</sup> That was a gift to A. B. and the heirs male of his body, and if he died without issue of his body, over. This was held to be an estate in tail male to A. B., and not in tail general. But if the argument used here as to the general failure of issue, and the want of issue \* generally, without specifying one particular kind of issue, \* 126 were to avail, then in *Turke v. Frencham* there ought to have been an estate in tail general given to A. B., the first taker, and not in tail male to A. B., and the heirs male of his body, and if he die without issue of his body, over generally, without issue — not without issue male, but without issue of his body. Still it was held not to be an estate in tail general, but an estate in tail male.

<sup>1</sup> 2 Dyer, 171.

I may observe upon this subject that there is the case of *Goodright v. Dunham*,<sup>1</sup> in which there is a great deal of important learning, and I would particularly refer to the very able commentary upon that, and two other cases, which are considered *with it* in that justly celebrated work of Mr. Fearne on Contingent Remainders.<sup>2</sup>

But I now hasten to a case, which, as it appears to me, we must set aside, and no longer look upon as law, if we decide contrary to the opinion of the Court below, and according to the argument of the learned and very able counsel for the appellant; I mean *Blackborn v. Edgley*.<sup>3</sup> Now that case was commented upon at the bar in the course of the argument, and very ably commented upon, and, according to my recollection, for it is a long while ago, the learned counsel for the appellant, feeling the pressure of that case, and that it stood very much in their way, were at great pains in endeavouring to distinguish it from the present without wishing to shake the authority of that decision. I think, Mr. Humphry, you did not deny the authority of that case so much as endeavour to show that it had not a decisive application to the case at bar? —

\*127 \* *Mr. Humphry*. — I attempted, my Lord, to show that the case was misreported, as your Lordship remembers, and I afterwards obtained an extract from the Registrar's Book, which showed that the case had been very materially misreported.

LORD BROUGHAM. — I recollect you said that there was a doubt about the case. Nevertheless, we must observe that if a case has been always supposed to be of one particular aspect and purport, and if that case being uniformly supposed in subsequent cases to be such, has, as such, ruled those subsequent cases, it will not do to go back to some critical difference which may be raised respecting the authority of that case, because the law may have been settled. I will even put it upon a wrong view of what that case was. But I do not think the difference here was so great as that. However, it is enough for me to say, even independently of that case, that my present motion to your Lordships to affirm the decree below does not rest merely upon the authority of decided cases, but upon the statement which I have made with respect to

<sup>1</sup> Douglas, 264.

<sup>2</sup> 1 P. Wms. 600.

<sup>3</sup> Pages 375, 376.

the purport and effect of the gift itself, and the terms used in that gift. And in this I have great satisfaction in finding that the view which I take is precisely the same as that taken by my noble and learned friend who heard the appeal with me, and from whom, when I sent to him a note of my opinion upon the case, and the grounds upon which it proceeded, I received in answer a complete confirmation of my opinion, he holding, in almost the very words which I had used, the same doctrine as I hold.

In *Blackborn v. Edgley*, the devise was to A. for life, without waste, remainder to trustees to preserve contingent remainders, remainder to A.'s first and other \* sons in tail \* 128 male, remainder to daughters in tail general, as tenants in common, and not as joint tenants, giving jointuring powers also to A., and if A. should die without issue generally, to B. and others, in fee. Now, Mr. Humphry, do you recollect whether, in looking at the Registrar's Book, you found any other terms used in which the gift over was couched ?

*Mr. Humphry.* — Yes, my Lord, and I have a copy. The disposition over is as follows : “ And in case the said Hewer Edgley should die without leaving issue behind him, or if such issue should happen to die without issue of their respective bodies, then his will was that his said real estate, and the estate to be purchased with his personal estate, should be so settled that in case his kinswoman Ann Edgley should be then living, then that she should enjoy the rents of his whole estate for her life, and from her decease one-fourth part thereof was to be enjoyed by the plaintiff William Blackborn, his heirs and assigns, one other fourth by the plaintiff Abraham Blackborn, his heirs and assigns, another fourth by the plaintiff Ann Jackson, her heirs and assigns, and the other fourth by Susanna Edgley, the younger daughter of the said Ann Edgley, her heirs and assigns.”

LORD BROUGHAM. — It seems then to describe the dying there, not so much without issue, as with failure of issue.

*Mr. Humphry.* — Dying without leaving issue behind him, pointing to the date at the time of his death. The terms of the decree were also very material. The decree is entered in the Registrar's Book.

LORD BROUGHAM. — My note of that case gives it, “ Held to be an estate for life in A., from antecedent parts of the devise, and not from the gift over.” The \* Court thought that it was \* 129

not in respect of the gift over, but in respect of the antecedent parts of the devise, and held it to be an estate for life in Hewer Edgley.

*Mr. Humphry.*—Yes; and your Lordship can see that there was no ground from the ultimate gift over, the words being “without leaving issue behind him,” to contend for an estate tail, because it did not point to the indefinite failure of issue.

LORD BROUGHAM.—My Lords, the case of *Morse v. Lord Ormonde*,<sup>1</sup> which was also cited, does not bear a close analogy to the present case, and, therefore, I do not so much rely upon it. Nevertheless, that case entirely adopted the principles laid down in *Blackborn v. Edgley*; and then we have the case of *Graves v. Hicks*,<sup>2</sup> in the Court of King’s Bench, a very material decision. It was a gift to A. for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons in tail male, and, on failure of such issue, to others. The fourth codicil, which was the material point, refers to the will, but devises that “in failure of issue of the said J. G.,” the estate shall go over. In that case, which was argued, the Judges gave no opinion of their own, in consequence of that bad practice which I hope now has been given up. I did all I could to prevent it from being continued. Because Lord Thurlow chose to carp at the arguments of the learned Judges in cases sent for their opinions in his time, they said that they could not do more than certify their opinion without any reasons,—contrary, in my opinion, to their  
\* 130 duty. While that bad \* practice prevailed, the Court gave no reasons, but only said, “this case has been argued before us by counsel, and we are of opinion that the plaintiff J. G. takes an estate\* for life under the will and codicils mentioned therein,” meaning, chiefly, the second and fourth codicils.

In the case of *Blackborn v. Edgley*, as reported in the excellent edition of Peere Williams’s Reports by Messrs. Morris, Lowndes and Randall, it is said (p. 606): “Here being a limitation upon Hewer Edgley’s death to his sons, and after, to his daughters, the following words, ‘if Hewer Edgley should die without issue,’ must be intended if he should die without such issue. And as to what had been argued, that unless these words were to create an estate

<sup>1</sup> 5 Maddock, 99; 1 Russell, 382.

<sup>2</sup> 5 Adolphus & Ellis, 38; see also 11 Simons, 536; 1 Clark & Fennelly, 20.

tail in Hewer Edgley, his son's daughters could not take, it did not appear the testator intended Hewer Edgley's son's daughters should take, for he might think that, on Hewer Edgley's dying without issue male, his name and family would be determined, for which reason he might limit it over to the daughters of Hewer Edgley himself; besides, the son of Hewer Edgley would be tenant in tail, and, when of age, might, by docking the entail, give the premises to his daughters."

With respect to the case of *Doe d. Bean v. Halley*,<sup>1</sup> upon which great reliance has been placed, both in the argument in the Court below, and in the argument here, less here perhaps than below, I have certainly to observe, with respect to the argument in the Court below, that I have seldom seen any case more ably argued on both sides, as reported in the Irish Equity Reports.<sup>2</sup> The judgment also is deserving of very great commendation:

\* it is a most excellent and elaborate judgment. The case \* 131 of *Doe v. Halley* is commented upon by the learned counsel, and in order to show that it ought to make no difference in the decision of this case, for which it was cited, *Doe v. Halley* is, in my opinion, ably got rid of, and shown not to apply to the case at bar. I need not, therefore, further refer to it, nor to the case of *Bamfield v. Topham*,<sup>3</sup> and other cases which I had intended to comment upon; so much rests upon the cases of *Graves v. Hicks* and *Blackborn v. Edgley*, that I shall not detain your Lordships by referring to the other cases.

Upon these grounds, and mainly upon my construction of the terms of this gift to which the authorities lend weight, no doubt, but which seem to me almost superfluous from what appears to me to be so manifest a propriety in that construction, I have arrived at the same conclusion as my noble and learned friend (Lord Cottenham), and at the same conclusion as the Court below. I am of opinion that John Baker took an estate for life only, notwithstanding the terms of the gift over, and, therefore, that the decree of the Court below ought, by your Lordships, to be affirmed.

*The appeal was accordingly dismissed, and the decree affirmed, with costs.*

<sup>1</sup> 8 Term Rep. 5.

<sup>2</sup> 11 Irish Eq. Rep. 104.

<sup>3</sup> 1 P. Wms. 54



1850. July 9, 12, 20, 23.

PATRICK M'GREGOR and CORDELIA, his Wife, . *Appellants.*  
 THOMAS TOPHAM and ELIZA HENRIETTA, his Wife, } *Respondents.*  
 and JOSEPH ARROWSMITH and JOHN TOPHAM, . }

*Equity. Practice. Heir at Law. New Trial.*

There is no absolute rule in a Court of Equity requiring that Court, as of course, to grant a second trial in an issue of *devisavit vel non*, when the first trial has terminated against the heir at law, if the Judge in Equity is satisfied that no new light can be thrown on the subject by a further investigation.

Though there may be an outstanding legal estate, which compels the heir at law to come into equity, he cannot, on that account, claim a right to have the issue tried a second time, if the Court, in the exercise of its discretion, should deem the first verdict satisfactory.

In every such issue the Court of Equity requires that all the attesting witnesses to a will shall, if it is possible to procure their attendance, be examined.

Circumstances under which the Court of Equity, in the exercise of its discretion, was held properly to have refused a new trial.

THIS was an appeal against a decree of the Vice-Chancellor Wigram,<sup>1</sup> refusing a new trial of the issue which had been tried in this case, and which resulted in a verdict for the respondents.

Richard Wrightson, late of Cockerton House, in the county of Durham, who was beneficially entitled under the will of his aunt, Mrs. Nanny Garth, to certain freehold and copyhold estates then vested in trustees, died at his residence there, on the 29th

\* 133 of April, 1830, \* without issue. His widow, Eliza Henrietta, now one of the respondents, took possession of his property.

She claimed to be entitled to all his real and personal estates, in virtue of a will alleged to have been made by him on the 29th of December, 1829, by which he devised all his freehold and copyhold estates whatsoever to the said "Eliza Henrietta, her heirs, sequels in right, executors, administrators, and assigns, &c." The appellant, Cordelia M'Gregor, was the sister of Richard Wrightson, and claimed to be his heiress at law. She had some time before married the other appellant, Patrick M'Gregor, against the will of her brother, and had, since that marriage, been living at

<sup>1</sup> 8 Hare, 488, 496. See *Boyse v. Rossborough*, 6 House of Lords Cases, 2, 41.

variance with him. Her general residence had been in Scotland, but she had occasionally been in England, and in the year 1837 was at Darlington, where the respondents lived, and received certain monies due under the will of a Mr. Michael Hardcastle, to Mrs. M'Gregor, as one of the grandchildren of a Mr. John Hardcastle. On that occasion they executed a release to the trustees of Mr. Michael Hardcastle's estate, upon payment of the amount due to Mrs. M'Gregor alone, — a fact which was much relied on by the respondents, as showing that the appellants did not, at that time, cast any doubt on the will of Richard Wrightson, for if they had done so, they would have claimed for Mrs. M'Gregor the amount due to her brother, Richard Wrightson, as well as that which was due to herself.

On the 30th of July, 1842, the appellants filed a bill in Chancery against the respondents, impeaching the validity of the will of Richard Wrightson, and claiming his property for his sister Cordelia, as heiress at law. The property, which chiefly consisted of lands and tenements of the manor of Bondgate in Darlington, in the county of \*Durham, had in the mean time been \*134 made the subject of settlement on the marriage of Mrs. Wrightson with Thomas Topham, under a deed dated on the 15th of December, 1831, and the legal estate therein was vested in the respondents Arrowsmith and John Topham, as trustees under the settlement. The bill was therefore filed against Topham and his wife, and the two trustees, and alleged that the will was either not signed by Richard Wrightson at all, or was signed by him, not on the 29th of December, 1829, but about the latter end of the month of March, or the beginning of April, 1830, and that Richard Wrightson had at that time become wholly incapable of self-government in consequence of using in excess wines and spirituous liquors, in the use of which he had been encouraged by his wife (the respondent, Mrs. Topham), by "positive directions given to the servants never to allow wine to be wanting, day or night, for his use, but always to place the same in his way, and in a convenient place for his use and enjoyment." The bill charged that by reason of habits of intoxication, indulged in towards the end of the year 1829, and the beginning of the year 1830, his mind became so seriously affected as to render him totally incapable of giving any instructions for a will, or transacting business of the most ordinary character, and that this was especially the case after

the hour of dinner, and that in fact very shortly after the month of March, 1830, he was attacked by delirium tremens, brought on by previous intemperance. The bill further charged that no instructions were ever given to the attorney or solicitor who prepared the will, by Richard Wrightson in person, but that the same were prepared by Eliza Henrietta Wrightson, without any communication with him, and that no draft of the will was ever  
 \* 135 delivered, or read over, or explained to \* Richard Wrightson, but was prepared by the directions of the said Eliza Henrietta alone, and that, if ever executed by him, was executed by him without his understanding the same, and at a late hour after dinner, and at home, when he was in a helpless and senseless state, and labouring under extreme inebriation; and further that the name purporting to be his signature was not his signature, but was a forgery.

The respondents by their answer denied all the allegations and charges in the bill; averred that the will was made on the 29th of December, 1829, and while Richard Wrightson was of sound and disposing mind, memory and understanding, and set out the will, which was very short, and was written on a single sheet of paper, and was alleged to have been "signed and sealed by Richard Wrightson," and was attested by Francis Mewburn, George Hind, and Jane Fenny." The answer alleged the will to have been made after tea, upon a day when Mr. Mewburn, the solicitor who prepared it, had spent the day with the testator for the purpose of arranging his affairs, and when they had dined together as early as three o'clock, and had taken only two or three glasses of wine each after dinner.

The cause came on to be heard before Vice-Chancellor Sir James Wigram, on the 11th of January, 1844, when the appellants having proved that Cordelia M'Gregor was sister and heiress at law of the deceased, an issue *devisavit vel non* was granted, and further directions and costs were reserved. An application was afterwards made by the appellants to change the venue from Durham to London, or Westminster, as they alleged that in consequence of the influence and connections of Mr. Mewburn, they could not have a fair and unprejudiced trial at the Durham assizes; but this application was refused. The issue accordingly came on for  
 \* 136 trial at \* Durham at the spring assizes of 1844, and after a trial which lasted three days, the jury returned a verdict for

the plaintiffs in the issue, the respondents in this appeal. The appellants on the 11th of November, 1844, moved before Vice-Chancellor Wigram, for a new trial; his Honour refused to make any order therein, but directed the costs to be costs in the cause. The cause was then set down for further directions, and came on to be heard on the 23d of January, 1845, when the Vice-Chancellor made a decree dismissing the bill with costs. These were the decrees appealed against.

*Sir F. Kelly* and *Mr. R. Palmer* (*Mr. Crompton* and *Mr. Milward* were with them) for the appellant.

There is no principle of law which declares that one verdict is to be for ever and finally binding on an heir at law. On the contrary, he is rather favoured than otherwise, in the facilities afforded him for trying the validity of any will, which would operate against him as a disherison. If there was not, from the particular circumstances of the case, any impediment of a legal or equitable kind, the heir at law would be at liberty to proceed by ejectment, without restraint; and if he failed in the first trial, he might go on again, subject only to the restriction of costs, and the interference of an equitable restraint against the perpetual repetition of actions; *Bootle v. Blundell*.<sup>1</sup> But for the legal impediment occasioned by the existence of an outstanding legal estate, the heir at law would be under no necessity of appealing to the House to relieve him from the consequences of this judgment. If this legal estate was not outstanding, a new ejectment might be brought; but now he has no other course than to appeal against the decree. It is wholly without authority or \* principle, that, \* 137 under circumstances such as exist here, a new trial should be refused. The heir at law does not ask to reverse the decision of the Court below, so as to have a decision on the will itself in her favour, but she claims to be allowed the advantage of a new trial, in order to enable the Court of Equity to decide justly and satisfactorily on the merits.

The case here is one of a nature to justify the demand for the fullest inquiry. The whole case of the will, which is to disinherit the heir at law, depends on the character and evidence of one individual, who was one of the attesting witnesses to the will. All the acts done, and all the documents attesting them, are his. On

<sup>1</sup> 19 Ves. 494.

the other side the appellants do not rest merely on the testimony of a single witness, but on that of the other two attesting witnesses, supported by the evidence of several most respectable persons.

The principle on which the Vice-Chancellor pronounced his decision on the application for a new trial is thus stated in his judgment: "Two grounds were pressed upon me: one was, the reluctance of this Court, as it is said, to bind the inheritance by a single trial; the second was, the evidence contained in the affidavits. The struggle here in truth was, whether this was the will of Mr. Wrightson or not; and in trying that question, it is extremely difficult to understand why, in principle, the circumstance that the subject matter of the suit is land, should make any difference in the question, whether the Court is to be satisfied with the verdict or not." Now the principle on which the appellants assert that they are entitled to a new trial is, not merely that the subject is land, but that there is an outstanding term which prevents them from having the same advantages as ordinary \* 138 heirs at law. And this reason is the stronger in the present case, because the respondents here are the parties by whom that outstanding legal estate has been created. But for this an ejectment might be brought, and the result would not be made to depend on a single trial.

The cases of *Gompertz v. Ansdell*,<sup>1</sup> and *Wright v. Tatham*,<sup>2</sup> show the anxiety of the Courts not to be bound by one trial, where the result of that trial is not perfectly satisfactory. The latter case, where there were proceedings both at law and in equity, is very important for that purpose. And in *Locke v. Colman*,<sup>3</sup> Lord Chancellor Cottenham held that, in cases in which, but for the existence of a trust, the title to real property would be tried at law, and a party would, consequently, have repeated opportunities of trying it, the Court of Chancery would be unwilling to bind the rights of the parties by a single trial, especially when it appears that more light will be thrown upon it by another trial. The principle on which Courts of Equity proceed in such cases is stated by Lord Hardwicke, in *Stace v. Mabbot*,<sup>4</sup> to be this, that they direct a trial

<sup>1</sup> 4 Mylne & Craig, 449.

<sup>2</sup> 1 Adolphus & Ellis, 3; 7 Adolphus & Ellis, 313; 5 Clark & Finnelly, 670.

<sup>3</sup> 2 Mylne & Craig, 42.

<sup>4</sup> 2 Ves. Sen. 552.

at law to inform the conscience of the Court, and if one trial is not such as to satisfy the Court, and give grounds to found a decree upon, it will grant a new trial. The principles thus stated, and acted upon in these cases, apply to the present, and the case of *Stace v. Mabbot* is all the stronger, because there Mr. Justice Foster, who first tried the cause, had declared himself satisfied with the verdict.

[LORD BROUGHAM. — But Lord Hardwicke says there,<sup>1</sup> “the Judge has declared he is well satisfied with the verdict, and if nothing appeared to me but \* what appeared to him \* 139 thereon, I think I should have been of the same opinion with him. My opinion, therefore, in granting a new trial, is grounded upon new evidence, which was not before the jury there, and which is material.”]

The case of *Pemberton v. Pemberton*<sup>2</sup> is an instance where the discretionary power of the Court was fully applied, and where three trials took place before the conscience of the Court was satisfied with the result. The Lord Chancellor (Eldon) there said :<sup>3</sup> “The ground upon which my opinion that a new trial ought to be granted in this cause rests, is one that cannot, in the least degree, prejudice the conclusion to which the Court ought to come. My opinion is not founded on the supposition that the verdict is wrong or right ; nor does it interfere with that conclusion which, upon subjects of this nature, I take to be entirely with the jury, giving due attention to the topics of law properly stated by the Judge. That is particularly proper in a case where a Court of Equity is dealing with a will ; as to which the administration of Equity is very different from that in other cases, upon most of which this Court has jurisdiction to determine upon inference of fact, as well as doctrine of equity. But the authority to declare what is and what is not a man’s last will is denied to this Court.” His Lordship afterwards added :<sup>4</sup> “I do not think this question has been sufficiently tried. This Court, though it cannot control the conclusion of a jury upon a will, must take care that the cause shall be fully and satisfactorily tried.” Unless the rule, thus clearly laid down, is disregarded, \* the judgment of \* 140 the Court below, refusing a new trial, must be reversed.

<sup>1</sup> 2 Ves. Sen. at p. 554.

<sup>2</sup> 13 Ves. 290.

<sup>3</sup> 13 Ves. at p. 297.

<sup>4</sup> 13 Ves. at p. 299.

*The Attorney-General (Sir J. Romilly) and Mr. Bacon (Mr. Smythe was with him) for the respondents :—*

Delay is the only object of this appeal; delay, from which the respondents have already suffered severely, in the loss by death of several of their witnesses. The appellants in 1837 were at Darlington, and knew all that had been done, but did not make any complaint, and may be said, in some measure, to have recognised the existing state of things. They did not file any bill to impeach the right of the respondents till 1842. In that interval four persons died, whose testimony would have been most important for the respondents. The Vice-Chancellor alluded to this delay as one of the circumstances in the appellants' own conduct which disentitled them to any relaxation of the rules of the Court in their favour. The only witness who can now speak directly to the preparation of the will is Mr. Mewburn, and if he should die, it is not possible to say in what position of difficulty the respondents would be placed. Under such circumstances, the Vice-Chancellor rightly exercised the discretion which is vested in him, and his decision is in accordance with all the previous cases. Even those which have been cited on the other side only show that Courts of Equity are not bound by the same strict rules as Courts of Law, but may grant repeated new trials, if the verdicts given do not satisfy the conscience of the Court. Here the verdict given did satisfy the Vice-Chancellor. [Several parts of his Honour's judgment, which was fully set forth in the appendix to the appellant's case, were here referred to in support of this argument.]

\* 141 \* There is no case which declares that the claim of an heir at law shall not be bound by the result of one trial. Lord Chancellor Erskine, in *White v. Wilson*,<sup>1</sup> declared that there was no rule to that effect. *Tatham v. Wright*,<sup>2</sup> shows that the heir at law here might have filed a bill to prevent the devisee from setting up the outstanding legal estate as a bar to the heir proceeding by ejectment. If so, then the main ground of the present application fails. *Wilson v. Beddard*,<sup>3</sup> which was a case most carefully considered, establishes that the heir at law is not entitled, as of course, to have a second trial of an issue *devisavit vel non*, and *Man v. Ricketts*,<sup>4</sup> was a case where, from his own misconduct, the heir at law lost the right to have the validity of a will, which he disputed,

<sup>1</sup> 13 Ves. 87.

<sup>2</sup> 12 Simons, 28.

<sup>3</sup> 2 Russell & Mylne, 1; 5 Clark & Fennelly, 670.

<sup>4</sup> 7 Beavan, 93.

tried at law by an issue, and having acted on the trusts of that will for years, he was refused an issue to try even the question of parcels. The case of *O' Connor v. Malone*<sup>1</sup> is a case which establishes, that where an issue has been granted and tried, the granting of a new trial is a mere matter of discretion, depending on the question whether the mind of the Judge in the Court of Equity is or is not satisfied with the first trial. It is clear, therefore, that there is no such rule, as that the inheritance cannot be bound by a single trial.

[LORD BROUGHAM. — You say there is no such rule; well, suppose there is not, then it is matter of discretion. The heir at law, if there is not an outstanding legal estate, would, without appealing for any assistance, have the right to take a fresh proceeding, and get a second trial, and as many more as he could, until \* the Court of Equity, on a bill filed to quiet the possession, \* 142 made a decree against him. That is the point of pressure I have felt throughout. You must get rid of it, not by proving that there is no such rule, but by showing that it is a matter of discretion, and that circumstances may justify the refusal of the application.]

Lord Keeper Northington, in the case of *The Earl of Darlington v. Bowes*,<sup>2</sup> on a matter of this kind coming before him, “inquired if there was any instance of a decree, where the inheritance would be absolutely bound, being made upon one verdict only. Observing that he thought there were some old ones, and that if any could be found, he would certainly refuse the present motion” (that was for a second trial), “but none having been produced, the motion was granted.” And in *Wake v. Conyers*,<sup>3</sup> referring to what he had done in the previous case, he observed, “I am determined if any such case should ever come before me again, to consider it in a different light, and to have the matter more fully inquired into, and prevent, if possible, an expense which is a reproach to the law.” What Lord Northington there intimated as the inclination of his mind has since been declared by Lord Cottenham, in *Locke v. Colman*, to be the rule of Courts of Equity. In these Courts it is a matter of discretion whether a second trial shall be had.

[LORD BROUGHAM. — The right of a person to have one trial on

<sup>1</sup> 6 Clark & Finnelly, 572.

<sup>2</sup> 1 Eden, at p. 334.

<sup>3</sup> 1 Eden, 270.



an issue, to determine the validity of a will, rests on a reasonable foundation, but not to be bound by the result of it is not reasonable.]

*Mr. R. Palmer*, in reply. — It is important, first of all, to see whether there is or is not a rule applicable to a case of this  
 \* 143 kind. All the cases tend to support the proposition that there is a general principle opposed to the refusal of a new trial in such a case, and opposed to deciding the rights of the heir at law by one verdict. It is impossible here to take any other course than that of trying the question by an issue, and then it must be recollected that the appellants here alleged that they have other materials besides those which on the first trial were submitted to the consideration of the jury ; so that this case comes within the observation made by Lord Hardwicke in *Stace v. Mabbot*. If, under such circumstances, the House should refuse the appellants the opportunity of again trying the question, the House would assume and exercise the functions of a jury, and would in fact be deciding on the validity of the will. Yet Lord Eldon has said that the power to do that is denied to a Court of Equity, *Pemberton v. Pemberton*.<sup>1</sup> It is no doubt true, as stated by Lord Cottenham in *Locke v. Colman*,<sup>2</sup> that “in a Court of Equity it is a matter of discretion whether a second trial shall be had,” but then that discretion is not to be exercised arbitrarily, for that learned Judge immediately adds, “but in exercising that discretion, this Court may properly have regard to what would have been the rights of the parties at law, and is therefore unwilling to bind the rights by a single trial.” The appellants here ask the House to have regard to what would have been these rights at law, and to grant another trial of this issue. The cases already quoted for the appellant, decided by the three of the greatest Judges that ever sat in equity, Lord Hardwicke, Lord Eldon, and Lord Cottenham, establish that equity will not allow the existence of an outstanding legal estate to put the heir at law in a worse position than a de-  
 \* 144 visee. A suit in equity is not the proper form to determine the validity of a will relating to the legal estate : that jurisdiction exists elsewhere, and therefore equity will not be drawn in to decide absolutely and irrevocably on its validity. Another principle is that it would be contrary to all equity to make a mere

<sup>1</sup> 13 Ves. at p. 297.

<sup>2</sup> 2 Mylne & Craig, at p. 45.

accident, entirely collateral to the rights of either party, give one of them a decided advantage over the other in trying the question of the validity of a will. In *Stace v. Mabbot*, Lord Hardwicke thought the general rule was sufficient to make it his duty to grant another trial. It is true that in *Pemberton v. Pemberton*,<sup>1</sup> the Judge was not satisfied with the first verdict, and so far that case appears unfavourable to the appellants; but the Vice-Chancellor, in this case, did not deal with the principle on which that case really depended, and which was there explained by Lord Eldon<sup>2</sup> to be this, that the heir was to be restored to the right of proceeding as in successive ejectments, without having that right improperly restrained by extraneous circumstances. Reliance has been placed on the case of *Wright v. Tatham*;<sup>3</sup> but that case shows most strongly the benefit of more than one hearing, and the evil that would have followed had one trial been taken to be decisive. And there, it is to be observed, that, as to some part of the property at least, it does not appear that there was any outstanding legal estate, and consequently as to that there could be proceedings by ejectment, and several trials took place. *Man v. Ricketts*<sup>4</sup> is not an authority for the argument here; for in that case the heir at law had himself proved the will, and had acted on it, and consequently had estopped himself by his own acts from demanding an issue. And *Boote v. \* Blundell*<sup>5</sup> is likewise inapplicable, because \* 145 there the heir had in reality abandoned the case when he declined to call all the attesting witnesses. Lord Eldon decided that case on what was done by the client himself, at the time of the trial, observing,<sup>6</sup> “the rule of this Court to have all the witnesses examined is not, by any means, a technical rule.” And *Wilson v. Beddard*<sup>7</sup> cannot be relied on here by the respondents, for in that case the Vice-Chancellor refused a new trial on the ground that, on looking at all the circumstances of the case, he was satisfied with the verdict.

Then as to the circumstances of the case which may affect the discretion of the Court. The appellants had no dealings in 1837 with the respondents as to the real estate, but were only in Darlington, on a matter relating to the personal estate of another

<sup>1</sup> 13 Ves. 290.<sup>2</sup> 13 Ves. 298.<sup>3</sup> 2 Russell & Mylne, 1; 5 Clark & Finnelly, 670.<sup>4</sup> 12 Simons, 28.<sup>5</sup> 7 Beavan, 93.<sup>6</sup> 19 Ves. 494.<sup>7</sup> 19 Ves. at p. 502.

relative. What the appellants did with relation to the personal estate of Mr. Michael Hardcastle will not affect their rights as to the real estate of Richard Wrightson. Then as to delay, where the circumstances show equity, mere delay will not be a bar to it.

On the two broad principles of Courts of Equity, first, that the Courts will not conclude the rights of an heir at law by a single trial, when, if there was not an outstanding legal estate, he might proceed at law, and take the opinion of more than one jury; and, secondly, that no imputation of erroneous conduct on the part of persons who appear entitled to certain rights will deprive them of the right to insist on enjoying the ordinary remedies of

\* 146 lawful claimants, this House will \* reverse the decision of the Vice-Chancellor, and will grant a new trial.

LORD BROUGHAM. — This was an appeal from an order of Vice-Chancellor Wigram, refusing a new trial of an issue, *devisavit vel non*, directed to try the validity of the will of Richard Wrightson, deceased. Your Lordships have heard the case at very great length, and argued with much ability as well as industry by the learned counsel on either side; and the case certainly is, in some respects, of a distressing, if not also of a perplexing nature; for the question is not merely the ordinary one, whether the instrument purporting to be a will is really such or not, but also whether a person of mature age, who had been the greater part of his life in the profession of the law, who had been employed as an attorney and solicitor by respectable clients, had clerks to learn the practice of the law under him, had mixed in society with a great variety of persons, including many of great consideration in the county palatine of Durham, and who had filled such a station that there were few solicitors in that part of the country, certainly none in his neighbourhood, more respected; the question is, whether a person of this description has or not committed perjury and forgery, that is to say, has been the principal party to the fabrication of a will, to give the estate of the deceased to his widow, and to the disherison of the heir at law, and after having fabricated the will, got the wife (for that is the suggestion) to write the name of her husband, he sitting in a chair in a state of stupefaction from drink or sleep, and then got his servants, respectable for persons in their station, but much more ignorant of such

\* 147 matters than the \* attorney, to attest the instrument as

witnesses together with himself, and finally defended his forgery by perjury, swearing falsely when examined on the trial, that the instrument which he had fabricated was the genuine will of the deceased.

My Lords, that is the first question, and a painful one it surely is, if there is any evidence, even leading to a grave suspicion, that such a proceeding could have taken place. But the embarrassment becomes great, when, in the next place, we find that in this case the evidence is conflicting, and that if you cannot, upon the whole, believe in the guilt of Mr. Mewburn, if you are satisfied upon the evidence, as well as upon all the probabilities of the case, that he has not committed the fraud and perjury, then you are driven to consider how the case for the appellant, the plaintiffs below, can have been supported, not by circumstantial evidence, but by the direct testimony of the other two witnesses, George Hind and Jane his wife, without false swearing on their part; for it is not easy to avoid casting this heavy blame upon them, in proportion as you relieve Mr. Mewburn from it.

All Judges (as I threw out at the close of the hearing), in the exercise of their high office, and indeed not only Judges, but all Christian men, ought, in common charity due from one fellow creature to another, to take that course, if it can correctly and justly be taken, which shall avoid imputing the guilt of that most horrid crime of perjury to any of the parties whose conduct comes in question; consequently, a stronger argument can never be adduced to a Court or a jury in any case of conflicting testimony than to contend, "If you believe A. is guilty of the offence charged, you must suppose his witness, B., has perjured himself."

\*Such a consideration naturally embarrasses the tribunal \* 148 to which the argument is addressed, and accordingly, relief is sought from the opposite view. Do not believe that A. is guilty of this offence, for if you do, you impute perjury to his witness, B., whereas, if you believe he is not guilty, you impute perjury to no one, the witnesses for the prosecution having only mistaken his person. That, in the course of my long experience, both at the bar and on the bench, has been the argument that I have always found to be the most powerful in obtaining a conclusion from the Court and jury, according to the contention of the party urging it.

I therefore regarded this case again and again, both during the

argument and since it closed, with the greatest anxiety, in order to find whether I could advise your Lordships to come to a conclusion upon it which should impute to no person guilt, almost the greatest that a man can commit. But I grieve to say that if I acquit Mr. Mewburn, I find it not perhaps impossible, but difficult, to acquit the two Hinds. No doubt it may be said that they had no interest in forswearing themselves. They were both respectable persons for their rank of life, they had both been servants of the late Mrs. Garth, from whom by will the property came to Mr. Wrightson ; they had both of them been long in her service, one of them as much as fifteen years, they had each received under that lady's will a legacy of 1000*l.*, and therefore they come into Court entitled to considerable respect, for they come forward with a good character ; therefore, if this had happened recently, instead of after a lapse of time, we must have been driven to the painful necessity of either believing that they had fabricated their story for the purpose of setting aside the will, or that the will

\* 149 was \* fabricated by Mr. Mewburn. But we must consider the length of time which has elapsed. The will is said by the 'one party to have been made in December, 1829, the others say it was not made till March or April, 1830. No proceedings were taken till July, 1842, when the bill was filed ; and the witnesses were examined in 1843, on interrogatories, and in 1844 at the trial.

The delay, therefore, of thirteen or fourteen years, which had so taken place, may truly be said to make no little difference in the case. It makes a great difference with respect to the right of the party to a new trial, which he now demands ; but it must be admitted also, that it makes a difference with respect to the opinion which we ought to form upon the testimony of the Hinds ; for though it would have been impossible to acquit them of perjury, had they been examined *de recenti facto*, we know that great variations take place in the recollection of individuals not accustomed to business, more especially after much gossiping talk has been had in the neighbourhood upon the subject on which they afterwards gave their evidence. Suggestions of idle or of designing persons get to be mixed up with the recollections, which become fainter and fainter, till at last their own fancy helps to mislead them, and they lend themselves to support a false case, possibly, without incurring the guilt of forswearing themselves.

I state this as the only satisfaction I have been able to obtain, in looking through the details of this case. I can give no other excuse for the conduct of these persons in the view to which the Court below and the jury have both come, and to which the learned Judge came when he approved the verdict, and the view, let me add, to which I have come, upon the whole evidence. Whether, or not, there should be a new trial, \* is \* 150 another question, turning upon other considerations, and not depending entirely upon the merits of the case as presented to the jury. But we have, first of all, to consider the merits ; and here I confess that I am unable to get over the radical and fundamental improbability which exists in the contention for the appellant, namely, that if the verdict is wrong, we must charge forgery and perjury upon a person, such as, from the evidence, I have described, Mr Mewburn to be, — a professional gentleman so universally respected in the county, that the parties who impeach his consent apply to have the venue changed, because, as they say, all the special jurors in Durham must be prejudiced in his favour, and no one there would listen to a charge against him.

This is of itself a strong reason against supposing it likely that he should have committed these grave offences. But what shall we say if it turns out that, if he did it, he did it without any assignable motive ; because, that a man may commit an offence with a view to profit by it, is a thing unhappily not impossible from the weakness and the wickedness of human nature ; but you must suppose not only a weakness and a wickedness of the heart, but an entire weakness of the head also, if he has committed forgery, and then supported it by perjury, all for the profit of another party with whom he had no connection, except that of being his attorney at the time that he was also the attorney of the testator. This converts, as it seems to me, the improbability into all but impossibility ; because, according to ordinary observation upon man's nature and their conduct, though you meet with too many who, to benefit themselves, will commit an offence, you meet with none who will commit an \* offence to \* 151 benefit others without the least interest of his own.

But then it is said, you may suppose, though you do not know that he had some interested motive, though you cannot discover what ; and we are desired to speculate on some possible advantage which he might have proposed to himself, and which no attempt is

made — even by suggestion and supposition — to specify. Some such motive is no doubt possible to be imagined; but then you may say the same of Hind and his wife. The only argument against rejecting their testimony is of just the same sort, and is open to the same answer. Why, it is said, should this respectable servant and his wife join to commit a fraud, or to swear so rashly, as at the very least they must have done, if their story against Mr. Mewburn is not true? Why should they so act, if they had no motive, except to give Mr. Wrightson the property, which did not benefit them at all? But if you are to speculate upon an unknown and undefined motive, — which Mr. Mewburn may, by possibility, have had, — if you are to fancy a possible interest, of which you have no proof whatever, you may just as well fancy, nay, I should think it rather less difficult to fancy, some lurking interested motive for Hind and his wife, in supporting the combination or the plan, or whatever you choose to call it, for setting aside the will, after they had subscribed it as attesting witnesses; so that the same argument by which you are to get rid of the radical difficulty in the case for the appellant, namely, the absence of motive on the part of the Hinds, applies with at least equal, if not with greater force, to get rid of the imputation on Mewburn.

\* 152 I therefore leave this supposition entirely out of \* view, and rest upon the great improbability of the appellant's case. I will not go into the evidence at all, because I am satisfied, for the reason which I have given, with the verdict of the jury, because the learned Judge who tried the cause was satisfied with that verdict, and because, if I had been sitting in the Court of Queen's Bench upon the motion for a new trial in an ordinary case (as I stated when I cut short a part of the respondent's argument, reducing it to the point of law, to which I am now coming), I should there have refused a new trial.

The only question remaining is, whether, from the circumstance of an outstanding legal estate, driving the heir at law into a Court of Equity, and no ejectment being competent to him, we ought not to give him, by a new trial of the issue, the same benefit which he would have had at law by bringing a second ejectment at his own pleasure. Ought we, for such a reason, to vary the ordinary course of things, and disregard the rule by which, if sitting in the Court of Queen's Bench instead of the Court of Chan-

cery, the Judge would be guided, being satisfied with the verdict? Ought we still to allow the heir to take further proceedings? Is there, in the simple fact that the appellant is heiress at law, sufficient to make your Lordships differ from the Vice-Chancellor, and grant the motion which he refused?

Now, upon the best consideration which I have been able to give to this question, regard being had to the grounds upon which a new trial is asked, I am of opinion that his Honor did rightly in refusing the new trial; that there is, upon the whole, not sufficient ground for the application, and consequently that the order below, with the decree that followed upon it, must stand.

I will not argue the question, at one time a *vezata* \* *questio* in Courts of Equity, but now I think nearly settled, whether or not an heir at law, before he can be disinherited by will, has a right to an issue. I will assume for the present that it is clear he has this right, unless special circumstances exist, as great lapse of time or acquiescence, or an adoption and acting under the instrument in question, to take the case out of the ordinary rule, and to take it out of what may be considered as all but the peremptory rule, in favour of the heir. We have nothing to do with that rule. Here the question is, whether one trial having been granted as of right, and that trial having led to a verdict against the heir at law, whether or not we should, in respect of the peculiarity I have stated, grant a second trial.

Now, first, I will observe that there cannot be said to be any rule at all making it peremptory, and as of course, to grant a second trial, when the first trial has terminated against the heir at law, and for this plain reason which I threw out at the hearing, that, if it was so, there would be no end of the proceedings, for, supposing the event of the second trial should be different from that of the first, there could be no ground whatever for refusing a third trial. Therefore, I think that there cannot be any such rule. But it might possibly be a principle of procedure generally recognised. Then how do the authorities and the cases deal with that subject? I cannot see that they give any light which is at all decisive in favour of the existence of such a rule.

I refer in the first place to *Locke v. Colman*, in which I find that my noble and learned friend, the late Lord Chancellor, lays it down that,<sup>1</sup> "It is sufficient for the purposes of this case to

<sup>1</sup> 2 Mylne & Craig, at p. 46.



\*154 say that the Court will not \*bind the inheritance by the result of a single trial." But the report does not stop there, it goes on "if," that is provided, "there be reason for believing that a second trial may afford more satisfactory grounds upon which a final adjudication of the rights of the parties may be founded." Here I beg to correct the marginal note which, as sometimes happens, is wrong, — "the Court of Chancery is unwilling," says the note, "to bind the rights of the parties by a single trial, especially when it appears likely that more light will be thrown upon the subject by another trial." Now "especially" is not the dictum of the Judge, it is the phrase of the learned reporter, and it makes a very material difference in the import of the dictum. It makes the Lord Chancellor say he will not bind the inheritance by one trial generally, but, least of all, where new light is to be expected from a second, whereas his Lordship makes the existence of such reasonable expectation a condition precedent as it were of granting a new trial, and does not state it only *inter-sively*. The reason why that phrase, "especially," has been added in the margin is, that in the remaining part of the case, when it comes on again, something is said which has been imported into the former portion, but the dictum upon which the authority rests is without the word "especially," and gives the rule as I have stated it. In the case of *White v. Wilson*,<sup>1</sup> Lord Erskine, in 1806, said, "I should be very sorry to find a rule in this Court that there must be a second trial of an issue, if desired, without any ground laid for it." Then comes the case of *Bootle v. Blundell*,<sup>2</sup>

where a second trial was refused; but no doubt that case \*155 proves nothing either \*way. The decision went chiefly upon the acquiescence of the party, in not having the two other subscribing witnesses called after the first had been examined. The application for a new trial was on the ground of these two not having been called, and, past all doubt, Lord Eldon would have granted it, but for the acquiescence of the parties in the examination of one only. It is quite clear that, notwithstanding the doubt expressed by Lord Thurlow, in *Powel v. Cleaver*,<sup>3</sup> the law is properly stated in a case cited from a manuscript by Mr. Joddrell, the reporter in Lord Hardwicke's time, which fully bears out Lord Eldon in saying<sup>4</sup> that the rule of the Court is to require

<sup>1</sup> 13 Ves. 87.

<sup>2</sup> 2 Brown C. C. at p. 504.

<sup>3</sup> 19 Ves. 494.

<sup>4</sup> 19 Ves. 505, 509.

the examination of all the witnesses, they being witnesses of the Court, and not of the parties ; and that no play of the parties saying, " this is your witness, and the other is mine," shall ever prevent the Court of Equity, whose conscience is to be informed by the trial, from having all of them called. But the party acquiesced in only one being examined, and Lord Eldon says, that in the ordinary case of miscarriage, the Court will form its judgment from the evidence, and from what appears upon the record ; but then he goes on to say, nevertheless he must send it to a jury, unless there is some reason for not sending it, that they may have all the material evidence before them.

The last case to which I shall advert is that of *Wilson v. Beddard*,<sup>1</sup> and it is very material, for there it cannot be said, as was said in some of the other cases, " it is a question of legitimacy ; it is not a question of the will, and of the heir at law," though, by the way, the heir at law has as much right to have the question \* of legitimacy tried, as the question of *devisavit* \* 156 *vel non* ; for the legitimacy of a claimant works his disherison, as much as the gift to a devisee. That case seems to me a very strong authority against the appellants. So in the case of *Locke v. Colman*, where there was a question whether he was the copyhold heir by the custom of the manor, and in another case the question was, whether he was born before or after marriage, such cases raise the question of his disherison, and he has as much right to an issue as when a will is set up against him. But *Wilson v. Beddard* was the case of a will. His Honour says, after quoting *Locke v. Colman*, " I am of opinion that, for the purpose of determining whether a new trial ought or ought not to be granted, I am at liberty to look not only at the facts which were presented to the jury, but also at the facts which might have been, but which were not presented to them." He makes another observation, which I cite as favouring the remarks on this case of two subscribing witnesses coming forward to swear against the instrument which they had attested. " I have always thought (says his Honour) that if any attention at all ought to be paid to the testimony of witnesses, who deny a solemn act which they have attested, it ought to be the slightest possible. Perhaps the best way would be to disregard it altogether." And Lord Mansfield was so clearly of this mind that he said that, instead of attending to such witnesses, they

<sup>1</sup> 12 Simons, 28.

ought to be consigned to the pillory. That was this great Judge's strong expression, which it may be impossible that we should entirely adopt, but it showed clearly in what light he viewed such testimony.

Upon these grounds, then, I am of opinion that the re-  
 \* 157 sons are clear for refusing a new trial, unless, as \* Lord Cottenham says in *Locke v. Colman*, we think there has been a failure before, or that new evidence will let in more light. Now what is the new evidence in this case? I will conclude the observations which I have to make, before moving the judgment, by adverting to that new evidence as stated in the affidavits.

One witness is Mrs. Duck. She only swears that "she well recollects the day in which Mewburn came to Cockerton House, and stayed there the whole day. He was only there once for the entire day during the period as aforesaid, and such day was in the spring of the year 1880."

Now every thing in the testimony of this witness, and the reliance to be placed upon it, depend upon the date; but, in consequence of the time which has elapsed — thirteen and fourteen years — between the facts in dispute and the examination, the witness is unable to fix the date. This, therefore, goes for nothing. Mr. Mewburn was there only once for a whole day; that is all we know.

But the principal evidence is that of Mrs. Mears. She says that she never had any conversation with Mrs. Wrightson, the widow, before the 31st of December, 1829, but on a day some time after that, when she came to see her. She is not sure of the date to a day; it was "on the 7th, the 8th, or the 9th of January, 1830, or on the 4th or 10th of February, or on the 29th of March," one or other of them; but she is sure it was after the 31st of December. Mrs. Wrightson had an important conversation with her. But every thing depends upon the time. If it was before the date of the will, the 29th of December, this evidence is absolutely immaterial. The only reason she has for fixing on the 31st of

December, is that by her book (which she produces), it  
 \* 158 appears that the \* first entry of any goods sold to Mrs.

Wrightson is on the 31st of December. It is, however, by no means clear that this entry is quite correct; she might have sold the goods before, and she might have dated the sale and put it down on the 31st of December; but for that entry there is not the shadow of a reason for her fixing the conversation after the

date of the will. But, furthermore, one observation arises upon this conversation : Mrs. Wrightson is represented to have said that her husband, the testator, had, during the night, a violent bleeding at the nose, at which she was greatly alarmed, and was afraid that he was going to die. Now, observe, it must have been a most violent bleeding if she was afraid that he was going to die ; and this fear constitutes the whole materiality of the evidence. She said "she felt the more uneasy, because the said Richard Wrightson had not made a will, or settled his affairs." Now, they have examined the two Hinds, and they have examined Elizabeth Walker, and other servants, but they do not produce one tittle of evidence in the affidavits of an event which must have been known in case there had been so violent a bleeding of the nose as to put their master's life in peril, and make their mistress believe that her husband was about to die. That violent bleeding was an event which must needs have been well known throughout the house. They were not likely to have forgotten it. Elizabeth Walker was not likely to have forgotten it, for she was servant in the house at the time. And George and Jane Hind were not likely to have forgotten it ; it was while the testator was in bed, in the middle of the night, that this great bleeding took place ; the whole of the sheets of the bed must have been stained by it ; and I defy any family of that moderate description, with very few servants, to have had this accident happen in the night without its

\* being well known, and making an impression upon all the \* 159 household the next morning. But there is no other evidence whatever of it. Your Lordships cannot suppose that no attempt was made to prove it. I conclude, from my experience at Nisi Prius, that the parties producing Mrs. Mears as a witness examined the servants to the point of the bleeding, and either found that they all said no such thing had happened as a bleeding at the nose in bed during the night, or that they found some other things which negatived it, and which would have rebutted the evidence of Mrs. Mears, as by antedating the bleeding at the nose, fixing it two or three days earlier, in which case there would at once be an end of this evidence as to its bearing upon the case.

Therefore, I think, upon the whole, there is nothing in the testimony of Duck and Mears to make your Lordships differ from the Vice-Chancellor, and grant a new trial of this issue. But there is enough in the case, independently of your opinion respecting that

testimony, to make you refuse it. There is enough in the case to prevent the exercise of any indulgence towards these appellants on account of the peculiarity to which I have adverted, namely, the circumstance of the outstanding legal estate having driven them to their equitable remedies, depriving them of their ejectment. Had it not been for the lapse of time ; had it not been for the lying by for so many years, when, upon the whole evidence, I am quite convinced they had as good means of trying the question speedily as they now have of trying it tardily, I should have been disposed to favour the argument, which rests upon the ground of that peculiarity, and to have granted a second trial. But their whole conduct, the delay, and the consequences that have ensued

from it, in the death of some persons, and the loss of recollection in others : the death of Coates \* and of the Wilkinsons, and Mr. Mewburn's two clerks ; and in the loss of memory and the impaired recollection of the witnesses examined, nay, for aught I know, the loss of written evidence ; of all this they must take the consequences and bear the loss arising from it themselves, and this is enough, in my opinion, to take the case out of the scope of that argument which is raised upon the plaintiff losing his right to repeated ejectments in consequence of the legal estate outstanding.

Upon the whole, therefore, I advise, that your Lordships should affirm the order of his Honour the Vice-Chancellor ; and I cannot close my observations on this case without adding, in justice to Mr. Mewburn, that in my opinion, he goes out of this High Court of Appeal as he went out of the Court which tried the issue at Durham, with his character entirely unimpeached.

*Order affirmed, and appeal dismissed, with costs.*

In the course of the arguments upon the facts, much had been said with relation to a seal affixed to the will, which seal Mr. Mewburn had sworn to have been so affixed before the signature was put to the will, but which, as the last mark of the last letter of the testator's name, ended abruptly at the seal, the appellants contended must have been affixed after the signature. Several propositions were made to remove the seal, and examine the signature, but Lord Brougham refused to do this, as he said that the House was bound, if possible, to restore the will to the ecclesiastical office in exactly the same state in which it come from that office. His Lordship at last, however, consented to wet the paper at the back of the seal with water, and having done this, and then examined it, he declared that the signature did stop abruptly at the seal, and, so far as appearances went, they fully confirmed the statement of Mr. Mewburn.

\*HUTTON v. THOMPSON, AND NORRIS v. COOPER. \*161

1851. July 8, 9; August 8.

In the Matter of the JOINT STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849, and of the DIRECT BIRMINGHAM, OXFORD, READING, AND BRIGHTON RAILWAY COMPANY.

JAMES HUTTON, *Appellant*.

HENRY THOMAS THOMPSON, *Respondent*.

AND

In the Matter of the said Acts, and of the WOLVERHAMPTON, CHESTER, AND BIRKENHEAD JUNCTION RAILWAY COMPANY.

HENRY JAMES NORRIS, *Appellant*.

WILLIAM COOPER, *Respondent*.

*Acceptance of Shares. Payment of Deposit. Contributory. Registration and Winding-up Acts.*

A. wrote a letter of application for shares in a Railway Company which was provisionally registered, and received an answer in the usual form declaring that certain shares had been allotted to him on which he was required to pay a deposit. A. paid the required deposit, but neither signed the subscribers' agreement nor the parliamentary contract. The scheme was abandoned:—

*Held*, that A. did not, by his letter of application for shares and by paying the deposits thereon, become a "member" of the company, or a "contributory," within the meaning of the Joint Stock Companies Winding-up Acts. He merely bound himself to take such shares as he had applied for, should the company ever be in fact established.

*Held*, therefore, that his name had been improperly put by the Master among the list of contributories, and that the Court below had rightly ordered it to be expunged from the list.

The 7 & 8 Vict. c 110, does not create any new liability in an allottee of shares, beyond what his own contract imports.

THESE two appeals were, by direction of the House, argued together, in the presence of the learned Judges \* of the \* 162 Courts of Common Law.<sup>1</sup> The facts of the case in the first appeal were these.

<sup>1</sup> The Judges were, the Lord Chief Baron, and Barons Parke, Alderson, and Platt, and Justices Patteson, Erle, Wightman, Williams, and Talfourd.

A company was formed in 1845, for the purpose of constructing a railway from Birmingham to Oxford, and thence to Reading and Brighton, and was provisionally registered, pursuant to the Act 7 & 8 Vict. c. 110. A prospectus was issued by the promoters of the company, containing the names of divers persons as forming the provisional committee thereof, and also a statement of the objects of the company, and that the capital was to be 2,000,000*l.*, to be raised by the issue of 800,000 shares of 25*l.* each; the deposit was fixed at 2*l.* 12*s.* 6*d.* per share.

On the 8th of October, 1845, a meeting was held at the offices of the company, at which there were present twenty-two members of the provisional committee; and resolutions were passed that fourteen of the persons therein named should be appointed a Committee of Management; and that until an Act of Parliament was obtained, the affairs of the company should be under their control, with power to allot shares and apply the funds of the company in payment of all expenses incurred in its formation, and in the preparations of plans, &c. to be submitted to Parliament.

On the 10th of October the respondent, H. T. Thompson, applied by letter to the provisional committee for an allotment of twenty shares in the company, and writing in the usual form of a letter of application, undertook to accept the same, or any less number, and pay the deposit, and sign the Parliamentary contract and subscribers' agreement when required.

• 163     \* The Secretary of the company sent the following letter in answer: —

*Letter of Allotment. — Not Transferable.*

*Direct Birmingham, Oxford, Reading, and Brighton Railway.*

46 Moorgate Street, London, 18th October, 1845.

Sir, — The Committee of Management have allotted to you twenty shares in this undertaking, and I am directed to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 52*l.* 10*s.*, into one of the under-mentioned banks,<sup>1</sup> on or before Friday, the 24th day of October, 1845, or this allotment will be null and void.

This letter, with the bankers' receipt appended hereto, will be exchanged for scrip upon your presenting it at the offices of the company, and executing the parliamentary contract and subscribers' agreement, which will lie at the above offices on and after the 27th October, and notice will be given when the deeds will be sent into the country.

I am, sir, &c. J. B. RAYNER, Secretary.

To HENRY THOMAS THOMPSON, Esq.

<sup>1</sup> The names of several bankers were mentioned.

The respondent paid the deposit of 2*l.* 12*s.* 6*d.* per share on the said shares, to the bankers of the company. He was not named in the list of the provisional or managing committee; he did not execute the Parliamentary contract or the subscribers' agreement, nor did he do any act in respect of the scheme, except that of paying the said deposit.

Of 70,000 shares allotted, the deposits were paid on 4295 shares only, and it therefore became impossible for the Committee of Management to proceed with the undertaking, and the same was consequently abandoned.

The members of the Committee of Management, collectively and individually, paid sums of money on account of debts contracted by them in the prosecution of the undertaking, in the preparation of plans, surveys, \* sections, and books of \* 164 reference; other debts of the company still remained unpaid.

On the 21st of December, 1849, an order was made by his Honour the Vice-Chancellor of England, on the petition of Thomas Stopford Jones, whereby it was ordered that the said company should be dissolved and wound up, under the provisions of the Joint Stock Companies Winding-up Acts of 1848 and 1849, 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108.

William Brougham, Esquire, the Master in rotation, to whom the winding up of the said company was referred, on the 28th of January, 1850, appointed the appellant official manager of the company; and as such official manager he soon afterwards made out from the books and papers of the company, and delivered to the Master a list of the contributories of the company, and therein included the name of Henry Thomas Thompson as a contributory, in virtue of his being an allottee of shares who had paid his deposit in respect of twenty shares in the said company.

The Master proceeded to settle such list of contributories, and on the 24th of June, 1850, certified among other things that a copy of the prospectus of the company, registered the 25th September, 1845, the minute book and allotment book of the company, a form of letter of application for shares, admitted by Henry Thomas Thompson to be the form of a letter of application for shares sent by him to the said company, and a letter of allotment of twenty shares, dated the 18th October, 1845, to the said H. T. Thompson, signed by Mr. Rayner, the secretary of the company, having been produced and read before him the said Master,



and the said H. T. Thompson having admitted the payment  
 \* 165 of 52*l.* 10*s.*, being the deposit on the said \*twenty shares according to the said letter of allotment, he had included the said H. T. Thompson in the said list as a contributory in respect of twenty shares of 25*l.* each, and he had settled the said list as regarded the inclusion of the said H. T. Thompson therein.

The respondent on the 11th of March, 1851, moved, before Vice-Chancellor Lord Cranworth, that the Master's decision, retaining the respondent's name in the list of contributories should be reversed, that his name might be excluded therefrom, and that the official manager might be ordered to pay the costs incurred by the respondent before the Master, and in this application.

The Vice-Chancellor made an order in the terms of the motion, and the respondent's name was accordingly excluded from the list of contributories.

One of these appeals was brought against that order.

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The facts of the other case were these: In the year 1845 a company was projected for making a railway between Birmingham and Birkenhead, with a capital of 1,000,000*l.*, to be raised by the creation of 50,000 shares of 20*l.* each. The company was provisionally registered pursuant to the Statute 7 & 8 Vict. c. 110, by the above name and description. A provisional committee was appointed, some members of whom were constituted a committee of management. The respondent was not on either committee. Plans and sections, with books of reference, were prepared, and in conformity with the standing orders of Parliament, were deposited at the several offices thereby prescribed. A parlia-  
 \* 166 mentary contract and subscribers' agreement \* were prepared, but neither of them was executed by any party. The expenses of obtaining the plans, sections, and books of reference, together with the charges of the agents and others employed upon the business, exceeded the sum of 12,000*l.* The undertaking was abandoned in January, 1846.

In October, 1849, five members of the provisional committee and committee of management, who were sued for debts due from the company, preferred their petition to the Lord Chancellor, praying that the company might be absolutely dissolved and wound up under the provisions of the Joint Stock Companies Winding-up

Acts, 1848 and 1849, and that it might be referred to one of the Masters in Chancery to wind up the affairs of the company.

The advertisements required by the Acts having been published, the petition was heard on the 3d of November, 1849, before the Vice-Chancellor of England, when it was ordered that the said company should be absolutely dissolved and wound up under the provisions of the said Acts, and that it should be referred to the Master (William Brougham, Esq.) to wind up the affairs of the company.

The Master appointed the appellant (H. J. Norris) official manager of the company, and on the 23d of June, 1851, made his certificate, which, after the usual recitals, was to the effect following : —

“ And it having been admitted before me by the said W. Cooper that the letter in the said schedule numbered 2 was written and sent by him to the office of the said company, and that the letters numbered 5, 6, 7, 8, 9, 10, and 11, also mentioned in said schedule, were received by him, and that he did not sign and return the letter numbered 7, and it also being admitted before me by the \* said official manager and W. Cooper, that he (W. Cooper) did not \*167 pay the deposit of two pounds two shillings per share mentioned in the letter of allotment, and that no scrip was ever issued, nor any subscribers' agreement or parliamentary contract ever signed, and although the said subscribers' agreement and parliamentary contract were prepared, the same were afterwards abandoned or cancelled for the purpose of getting a return of the stamp duty thereon, — I have thought fit to include the name of the said William Cooper in the said list.”

The schedule annexed to the certificate contained a prospectus of the company, with lists of the provisional and acting committees, and also letters, of which the following alone are important : —

*To the Provisional Committee of the Wolverhampton, &c. Railway Company.*

Gentlemen, — I hereby request that you will allot me twenty shares of No. 2.<sup>1</sup> 20*l.* each in the above proposed railway, and I hereby undertake to pay the deposit thereon, or on any less number of shares which may be allotted to me, and to execute the parliamentary contract and subscribers' agreement when required to do so. I am, gentlemen, your obedient servant,

W. COOPER, jun.

*Wolverhampton, &c. Junction Railway Company.*

Provisionally registered, &c. Capital, 1,000,000*l.*, in 50,000 shares of No. 5. 20*l.* each. Deposit, 2*l.* 2*s.* per share.

*Birmingham, 1st November, 1845.*

Sir, — I am directed to inform you that the Committee of Management have,

<sup>1</sup> These are the letters numbered in the Master's certificate.

in compliance with your application, allotted to you twenty shares in this undertaking, and that the deposit of 2*l.* 2*s.* per share, amounting to the sum of 42*l.* must be paid to one of the under-mentioned bankers<sup>1</sup> on or before Saturday the 8th day of November, who, upon receipt \*thereof, will sign the voucher at the foot of this letter. This letter, with the banker's receipt, must be exchanged for scrip certificates, which will be granted upon your executing the subscribers' agreement and parliamentary contract, without which no person will be recognised as a subscriber, or be entitled to any interest in the undertaking. I am, sir, &c.,

JOHN SMITH, Solicitor.

CHARLES W. JACKSON, Sec. *pro temp.*

*Wolverhampton, &c. Junction Railway Company.*

No. 6. Sir, — The Managing Committee, though they feel assured you will take up the shares which have been allotted to you on your own application, by paying the deposit thereon within the period fixed, nevertheless deem it right to state that you may decline them, if you see fit, as the shares will be readily taken by other parties; but if such be your wish, in consequence of the recent panic, or any other cause, you will at once see the propriety of immediately communicating your intention, by signing and forwarding the letter enclosed, otherwise the Committee will fully calculate that the deposit will be duly paid. I am, sir, &c., JOHN SMITH.

*Wolverhampton, &c. Railway Company.*

No. 7. Sir, — It is not my intention to take the shares allotted to me. I am, sir, your obedient servant.\*

JOHN SMITH, Esq., 40 Temple Street, Birmingham.

Then followed the letters marked in the Master's references as 8 and 9, in which the respondent was urged to pay up the deposits, and No. 10, in which he was threatened with proceedings if he did not make the payment, and No. 11 referred him to the recent case of *Woolmer v. Toby*, which, it was said, established his legal liability to pay the whole of the deposit, notwithstanding which, however, an offer was made to accept 2*s.* per share towards de-  
\*169 fraying the expenses of \*the company, provided that sum was paid within a limited time.

The respondent, W. Cooper, on the 24th of June, 1851, appealed against the certificate of the Master. The appeal was heard before Vice-Chancellor Lord Cranworth, on the same day, when it was ordered that the decision of the Master should be reversed, and

<sup>1</sup> Several banking houses were mentioned.

\* The respondent did not sign or return this letter, or acknowledge the receipt of the letter of allotment.

that the name of William Cooper, jun., should be expunged from the list of contributories of the company as such allottee as aforesaid.

The second of the appeals was against that order.

THE LORD CHANCELLOR. — As the distinction between the two cases is one of fact, the learned counsel had better first direct their attention to that case in which the facts most appear to be opposed to the decision. The case of *Hutton v. Thompson* is, for this purpose, the stronger case, for if, where the deposits have been paid, the party is not a contributory, he cannot be so in the other case, where, all other facts being the same, no payment has been made.

*Mr. Bethell* yielded to the wish of the House, though he had prepared himself to begin with the other case.

It was then arranged that the appellants' arguments should be taken to apply to the two cases, and that one counsel should be heard for each respondent, and that there should be a general reply.

*Mr. Bethell* and *Mr. Roxburgh* for the appellants. — The Statute 7 & 8 Vict. c. 110, which is extended and enforced by the 11 & 12 Vict. c. 45, constitutes a company, and gives to the subscribers to that company the character of a partnership. If so, the liability of \* these respondents is clear, for they have made \*170 themselves members of that partnership. An allottee of shares is, for such a purpose, a partner. Such was the course of the decisions up to the last year, when, for the first time, some Judges began to act upon a different principle.

In order to consider this case properly, it is necessary to go at once to the Joint Stock Companies Registration Act (7 & 8 Vict. c. 110).

First, by provisional registration all are made partners in the immature company. So that as soon as any one engages to take shares in that company, he takes upon himself the character of subscriber to it. A member thereof must bear a share of its expenses. If the immature company is subject to the Winding-up Acts, the subscribers must also be made contributories under it. The preamble of the 7 & 8 Vict. c. 110, says, "whereas it is expedient to make provision for the due registration of Joint Stock

Companies during the formation and subsistence thereof," — a very remarkable phrase, and one which is rendered still more important by the fact that the words of the Act throughout apply to the formation and subsistence of companies. The second section, in giving the description of the companies that are to come within the operation of the statute, expressly speaks of "the partnership," and "the partners." And in the third section it is declared that "the word 'subscriber' shall mean any person who shall have agreed in writing to take or (*sic*) have taken any shares in a proposed company, or in a company formed," and it proceeds to use words which exactly apply to these respondents, "and who shall not have executed the deed of settlement, or a deed referring \* 171 thereto." So that the omission of the respondents \* to do this will not relieve them from the liability. The seventh clause in the fourth section, and the eighth and ninth clauses of the seventh section, in like manner directly apply to the "subscribers." In the 11 & 12 Vict. c. 45, § 3, it is said that the "word 'member' shall mean any person entitled to a share of the assets or accruing profits of any such company," and that the word "'contributory' shall include every member of a company." Taking the two statutes together, the "subscriber" mentioned in one is plainly the "member" and "contributory" spoken of in the other.

The ninth section of the 7 & 8 Vict. c. 110, shows the application of the statute to a company of a kind like the present, and the 23d section is extremely material, as limiting the amount of subscriptions to be paid in the projected companies which are the objects of the statute. That section allows a provisional registration to be in force for twelve months, and makes it lawful for the promoters to assume the name of the intended company, but coupled with the words, "registered provisionally." They are to allot shares, and to receive deposits, restricted however to a certain amount, on such shares. The subscriber, as soon as he accepts such shares, brings himself within this section, and incurs a liability. The twenty-sixth section prohibits the sale of shares by subscribers till complete registration.

Taking these sections of the two statutes together, and then looking at the facts of these cases, it is clear that the respondents are members of the two companies.

[THE LORD CHANCELLOR. — The respondents have not received scrip certificates, and the letter of the committee of manage-

ment, speaking of those certificates, says, \* “without which \* 172 no person will be recognised as a subscriber, or be entitled to any interest in the undertaking.”]

But the letter of application undertakes to do what is required, and the Statute 7 & 8 Vict. describes “subscribers,” while the 11 & 12 Vict. shows that subscribers for shares are to be considered “members” of the company. The respondents here cannot deny their engagements to take shares and subscribe the deeds, and they are consequently bound to contribute to the funds of the company. The principle of the law on this subject was erroneously laid down in *Ex parte Capper*.<sup>1</sup> The facts of that case amply sustained the charge of liability. A. applied by letter to the committee of a provisionally registered railway company for fifty shares in the undertaking, and thereby undertook to accept them, or any less number that might be allotted to him, and to pay the deposits thereon, and to sign the parliamentary contract and subscribers’ agreement when required. The committee allotted him thirty shares, but he did not pay the deposit thereon, nor do any other act in pursuance of his undertaking. The project proved abortive, and the affairs of the company were ordered to be wound up. Vice-Chancellor Lord Cranworth held, that A. was not liable as a contributory, even to the extent of the deposits. The Vice-Chancellor there declared his opinion that persons engaged in forming a railway company were neither a corporation nor a trading partnership, and he stated that that case was distinguishable from *Clements v. Todd*,<sup>2</sup> and from *Jones v. Harrison*,<sup>3</sup> on the ground of the particular nature of the contract in each \* case, to which alone he attributed the decision. The \* 173 Vice-Chancellor then commented on the case of *Ashpitel v. Sercombe*,<sup>4</sup> which, he said, was entitled to very great weight, as being decided by a Court of Error, and he thus described what he believed to be the doctrine laid down in that case: “It establishes conclusively that a person, by accepting shares and paying his deposits, does not thereby authorise the expenditure of any part of his deposit in the expenses of forming the company. It follows *a multo fortiori* that no person, by merely agreeing to take shares and paying his deposit, enters into any agreement to contribute

<sup>1</sup> 1 Simons N. S. 178.

<sup>2</sup> 2 Exch. Rep. 52.

<sup>3</sup> 1 Exch. Rep. 268.

<sup>4</sup> 19 Law Journal, N. S. Exch. 82; 5 Exch. Rep. 147.

any expenses incurred or to be incurred before the company is established." The Vice-Chancellor afterwards added, "what I have to decide is, as I have already stated, a question of fact rather than of law; when it is once established as matter of law that a given state of circumstances affords no evidence for a jury warranting the finding of a particular result, it is certainly the duty of this Court, when it has to say what is the legal result from the same state of circumstances, to arrive at the same conclusion. Applying this reasoning to the case now before me, I think that the principle of the decision of the Court of Error in *Ashpitel v. Sercombe* is decisive." This doctrine can now no longer be maintained. On the contrary, the principle to be acted on is, that the moment a man assents to assist in forming an association, he becomes a subscriber to it. *Capper's Case* was in direct contradiction to that of *Ex parte Matthew in re The Direct Exeter Railway Company*.<sup>1</sup> There the usual form of letter of application for shares was written on the 20th October, 1845, and the let-

\* 174 ter of allotment was sent on the 15th December. \* To this

letter no answer was given. Matthews neither declined the allotment nor made any payment on it. But Vice-Chancellor Knight Bruce, not finding any proof of fraud as the occasion of the delay, thought that Matthew ought to have answered the letter of allotment, and therefore as the Master had put him on the list of contributories, would not reverse the Master's decision. After that decision came the case of *Hutton v. Upfill*,<sup>2</sup> and it is impossible to uphold the authority of that case if the decision in *Capper's Case* is to be treated as law. The case of *Norris v. Cottle*<sup>3</sup> is in complete accordance with that of *Hutton v. Upfill* in principle, and the different result in the two cases is attributable solely to the differences of circumstances in them.

[LORD BROUGHAM. — It has been supposed that *Hutton v. Upfill* is erroneous in point of principle, because it is said that as neither of the two facts which existed in that case would, taken separately, be sufficient to constitute liability, the two taken together cannot constitute it. But that argument is itself erroneous, as every day's practice in bankruptcy proves, for the act of buying will not alone make a man a trader, nor will the act of selling alone make him one, so as to bring him within the operation of the bankrupt

<sup>1</sup> 14 Jurist, 928.

<sup>2</sup> 2 House of Lords Cases, 647. ;

<sup>3</sup> 2 House of Lords Cases, 674.

laws, but the act of buying, and the act of selling, taken in combination, will produce that effect.]

The principle of law applicable to this case was fully stated by Lord Cottenham, in the case of *The Earl of Mansfield*.<sup>1</sup> There an allottee of shares paid the required deposit thereon, and received the scrip certificates of the shares, acknowledged the receipt thereof, and was registered as a shareholder. He did, in fact, \* what Thompson has done in this case. The com- \* 175  
pany commenced operations before its capital was fully subscribed, but afterwards discontinued its business as unprofitable, the scheme being neither fraudulent nor abortive. The allottee was held to be a contributory, although he had not signed the deed of settlement, nor paid any of the calls when demanded, nor taken any part in the affairs of the company. The case is the more worthy of attention, because it was a hearing on appeal. The Lord Chancellor (Lord Cottenham) observed: "The Joint Stock Company's Winding-up Act has said, that all members who so accept shares are liable to contribute. It has, however, been contended, on the authority of a class of cases referred to, that a person is not liable to contribute who cannot be sued as a member of the company by a creditor. But the words of the Act are, that the term 'contributory' is to include every member of a company, and also every other person liable to contribute. In the present case, a partnership, in the strict sense of the word, may not have existed; but the acts done by persons in the situation of Lord Mansfield hold out to the world a notice of an association for the particular object stated by the promoters of the company; and the Winding-up Act makes no distinction between persons who have or have not done particular acts, provided they have become members of the company." This case may be considered to have settled the principle, so far as the construction of the statute is concerned. It may also be referred to as establishing that the letters constituted a contract which equity would enforce. The liability thus established has been held not to be discharged on the ground that the prospectus contained incorrect and even fraudulent statements, in reliance on which \* the applicant \* 176  
asked for shares, provided only that the persons seeking to make him liable were not those who made the fraudulent state-

<sup>1</sup> 2 Macnaghten & Gordon, 57.



ments. *Parbury's Case*.<sup>1</sup> So that even fraud itself would be no relief from liability, except as against the persons actually committing it. And in *Beresford's Case*,<sup>2</sup> the Court would have followed the same rule, but that the directors of the company there had previously declared the shares of that allottee to be forfeited, and he had submitted to the forfeiture. By their own act they had released him, and, of course, could not afterwards contradict their own act. It is clear that, on the terms of the statute, those respondents ought to have been held to be contributories.

Independently of the terms of the statutes, it is also clear that the respondents are liable. According to the common law authorities, the party who takes shares in such a company gives authority to the promoters of it to incur expenses, and becomes liable to disburse his share of them; *Barnett v. Lambert*.<sup>3</sup> The decisions of *Reynell v. Lewis*, and *Wyld v. Hopkins*,<sup>4</sup> did not overrule the principle there laid down, but only recognised certain facts as capable of taking the case out of the operation of the principle. *Garwood v. Ede*<sup>5</sup> was decided on this principle. The liability is established, — the extent of that liability is a matter to be afterwards considered. That, of course, depends on the particular circumstances of each individual case.

*Mr. C. P. Cooper* (with whom was *Mr. Morris*) for the respondent Thompson. — The appellant can only establish a liability in this case by establishing \* three points: first, that by the words of the statute the liability is created; secondly, that the association constituted a partnership; and, thirdly, that having subscribed the agreement, the party thereby gave the promoters authority to incur expenses. As to the first, it is denied that either of the statutes has created any liability beyond what before existed. There are no words in them which have that effect. [He referred to several sections in support of this argument.] It is remarkable too, that in all the cases of allottees, no one has ever argued upon any liability supposed to be created by the statutes. The question of liability has always been decided with reference to the common law alone. *Garwood v. Ede*,<sup>6</sup> *Clements v. Todd*,<sup>7</sup> *Jones v. Harrison*,<sup>8</sup> *Willey v. Parratt*,<sup>9</sup> *Ashpitel v.*

<sup>1</sup> 3 De Gex & Smale, 43; see also *Sharpus's Case*, 3 De Gex & Smale, 49.

<sup>2</sup> 2 Macnaghten & Gordon, 197.

<sup>3</sup> 15 Meeson & Welsby, 489.

<sup>4</sup> 15 Meeson & Welsby, at p. 517.

<sup>5</sup> 1 Exch. Rep. 264.

<sup>6</sup> 1 Exch. Rep. 264.

<sup>7</sup> 1 Exch. Rep. at p. 268.

<sup>8</sup> 2 Exch. Rep. 52.

<sup>9</sup> 3 Exch. Rep. 211.

*Sercombe*,<sup>1</sup> *Ex parte Maudslay v. Field*,<sup>2</sup> *Lefroy v. Gore*,<sup>3</sup> where Lord Chancellor Sugden expressly held, that the test of liability to contribution was the liability to the plaintiff at law, and not the holding of shares in a proposed company; *Wood v. The Duke of Argyll*,<sup>4</sup> *Besley's Case*,<sup>5</sup> and *Cottle's Case*.<sup>6</sup> Then as to the second point. *Van Sandau v. Moore*<sup>7</sup> shows that a joint stock company does not constitute a partnership, for there a bill filed by one member of such a company for himself and others, praying for a dissolution of the concern, was held not to be sustainable. *Nockells v. Crosby*,<sup>8</sup> and *Kempson v. Saunders*,<sup>9</sup> which were cases at \* law, proceeded on the same principle. Passing \* 178 thence to the analogous cases of clubs, it was held in *Fleming v. Hector*,<sup>10</sup> that a club was not a partnership, and though that case was commented on by counsel in argument in *Barnett v. Lambert*,<sup>11</sup> the argument was not adopted, but was rather disclaimed by the Court, whose decision went on the particular facts then under consideration.

Then as to the third point, there is no authority for contending that the mere fact of subscribing to a company gives the committee of the company authority to pledge the subscribers' credit, and the cases of *Tredwen v. Bourne*,<sup>12</sup> and *Barnett v. Lambert*,<sup>13</sup> which seem, at first sight, to authorise that doctrine, depended much on the acts of the defendants themselves, and cannot be considered as having that effect, the latter especially being virtually overruled by the Court of Exchequer in the more deliberately considered judgments of *Reynell v. Lewis*<sup>14</sup> and *Wyld v. Hopkins*.<sup>14</sup> *Besley's Case*, reported on the rehearing before Lord Truro upon special application,<sup>15</sup> in March, 1851, is important, because in a part of the Lord Chancellor's judgment the epitome of the whole law on this point is to be found. His Lordship says: <sup>16</sup> "The only ground therefore upon which Mr. Besley could become liable to the cred-

<sup>1</sup> 5 Exch. Rep. 147.<sup>4</sup> 6 Manning & Granger, 928.<sup>2</sup> 17 Simons, 157.<sup>6</sup> 2 Macnaghten & Gordon, 176.<sup>3</sup> 1 Jones & La Touche, 571.<sup>2</sup> 2 Macnaghten & Gordon, 185; 2 House of Lords Cases, 647.<sup>7</sup> 1 Russell, 441.<sup>11</sup> 15 Meeson & Welsby, 489, 491.<sup>8</sup> 3 Barnewall & Cresswell, 814.<sup>6</sup> 6 Meeson & Welsby, 461.<sup>4</sup> 4 Bingham, 5.<sup>13</sup> 15 Meeson & Welsby, 489.<sup>10</sup> 2 Meeson & Welsby, 172.<sup>14</sup> 15 Meeson & Welsby, 517.<sup>15</sup> 15 Jurist, 523; 20 Law Journal N. S. Chanc. 385.<sup>16</sup> 15 Jurist, at p. 525; 20 Law Journal N. S. Chanc. at pp. 387, 388.

itors must be, that these acts, by operation of the law, gave authority to those who contracted with the creditors to pledge Mr. Besley's credit by such contracts." The liability as mere matter of law, following on the declared intention to accept shares, \* 179 is here not recognised, but \* the liability is spoken as arising upon acts alone, acts which must amount to what would, under ordinary circumstances, constitute in law an authority to pledge the credit of the person performing them. And this doctrine of the Lord Chancellor is further enforced by another part of his judgment, where he says, "In considering the question whether Mr. Besley was rightly placed on the list of contributories to the payment of the debts contracted by the persons engaged in the endeavour to establish the projected company, it is proper to consider the grounds on which Mr. Besley would become legally or equitably liable to be placed on such list. \* \* \* Mr. Besley might become liable to the creditors by having personally contracted with them, or by his having given authority to those who did contract with the creditors, to pledge his credit. He could in no other way become subject to any liability to the creditors. The liability to contribute towards the indemnity of those persons who did incur a liability to the creditors, must also result from a contract with them, express, or implied from his conduct." Wherever, therefore, there has been no such contract, no liability follows, and here there has been none. The respondent has offered to accept shares, and has paid certain deposits as an earnest of his intention to do so, but he has not entered into a complete contract, for he has not done one of the acts "without which," as the directors say in their letter, his title to be a shareholder shall not be complete. The respondent is entitled, according to the case of *Walstab v. Spottiswoode*,<sup>1</sup> to recover back his deposits as on a failure of consideration, and if so, no liability to make further payments can be charged against him.

\* 180 \* [LORD BROUGHAM.—All the arguments hitherto have gone on the assumption that the order of reference was correct.]

*Mr. Rolt* intended to raise that very question, and to contend that the order of reference was itself bad, and that this association or company did not fall within the provisions of the Winding-up Acts.

<sup>1</sup> 15 Meeson & Welsby, 501.

*Mr. Bethell.*—That argument cannot be raised in this case. There was no appeal in the Court below against the order upon that account: there consequently can be none here. If the House allowed that question to be now discussed, it would be assuming an original, not exercising an appellate, jurisdiction.

LORD BROUGHAM.—As the parties did not appeal against the order in the Court below, we cannot hear any discussion upon it now.<sup>1</sup>

*Mr. Rolt*, with whom was *Mr. Rogers*, for the respondent Cooper.

There is no necessary connection between this case and that of Thompson. There the shares were taken and the deposits paid; here, Cooper had the option of taking the shares, and he did not take them, so that even if Thompson should be held liable, Cooper cannot be so treated. He is under no liability to be charged as a contributory. Even supposing it could be held that the omission to return the letters of allotment was equivalent to an acceptance of the shares, and it is confidently submitted that no such doctrine is tenable, still, his subscribing for the shares would not give any authority to the promoters of the scheme to pledge his credit for expenses. \* In this latter respect, alone, Cooper's \* 181 case resembles Thompson's, but in the former they are distinguishable, and Cooper can in no way be described as a subscriber or shareholder in the company. The two cases of *Barnett v. Lambert*<sup>2</sup> and *Garwood v. Ede*<sup>3</sup> are distinguishable from the present, because in the first, the party actually attended the meeting of the committee and acted as its chairman, and in the second, he not only paid the deposit, but he signed the subscribers' agreement, which gave the directors power to incur the very expenses for which he was held liable. But then the cases of *Norris v. Cottle*<sup>4</sup> and *Hutton v. Upfill*<sup>5</sup> are relied on by the other side. They cannot affect the present, and it is submitted that the principle on which they are supposed to have proceeded was erroneous. One of these cases presented what may be described as a

<sup>1</sup> The Lord Chancellor afterwards put a question to the Judges on this point (see post, *Bright v. Hutton*, at p. 353), but no answer was given to it, nor did the judgment ultimately pronounced take any notice of it.

<sup>2</sup> 15 Meeson & Welsby, 489.

<sup>3</sup> 1 Exch. Rep. 264.

<sup>4</sup> 2 House of Lords Cases, 647.

<sup>5</sup> 2 House of Lords Cases, 674.

cipher, namely, the being a member of the provisional committee, to which was added another cipher, the acceptance of shares ; but one of these ciphers was afterwards allowed to be converted into a unit, by the bare fact of its being joined with the other. Surely this is an error in principle, and no lawful deduction of consequences can be made from it.

[LORD BROUGHAM. — This abstract reasoning is not always capable of being correctly applied in law. It has been already answered.<sup>1</sup> Lord Cottenham entirely agreed with the judgment in *Hutton v. Upfill*, and was indeed disposed to carry the principle further.]

It is clear at least that there must be some positive act done, in order to make the party liable. *Mathew's Case*<sup>2</sup> does not  
 \* 182 impeach this proposition, for there \* the wilful delay of the party was treated as an act, and looked on as a virtual acceptance of the letter of allotment. *Besley's Case*<sup>3</sup> is now no longer an authority, having been reversed on rehearing by the present Lord Chancellor.<sup>4</sup> Then comes *Capper's Case*,<sup>5</sup> which has been recently decided, and where the undertaking to accept shares without doing any other act has been held insufficient to establish any liability.

[THE LORD CHANCELLOR. — It had been in effect decided as long ago as the case of *Woolmer v. Toby*,<sup>6</sup> that the mere undertaking to accept shares was not alone sufficient for that purpose.]

Certainly ; no common law liability was thereby created. That liability has not been altered by the statute. The call on each shareholder for ten shillings per share is authorised by the statute for a certain specified purpose, and that itself shows that no further liability was created by the statute. The last case on the subject is that of *Ex parte James*,<sup>7</sup> which adopted the law previously laid down, and showed that where a party, though calling himself a member of the company, was not liable as a contributory, he could not be heard on petition for a preliminary inquiry as to the expediency of winding up the company. If he does not possess the rights, surely he cannot be subjected to the liabilities of a shareholder.

<sup>1</sup> See ante, p. 174.

<sup>2</sup> 14 Jurist, 928.

<sup>3</sup> 2 Macnaghten & Gordon, 176.

<sup>4</sup> 20 Law Journal N. S. Chanc. 385 ; 15 Jurist, 523.

<sup>5</sup> 1 Simons N. S. 178.

<sup>6</sup> 10 Q. B. 691.

<sup>7</sup> 1 Simons N. S. 140.

*Mr. Bethell* in reply on both cases. — There are three propositions in this case, which are perfectly clear. First, that though a subscriber to a company may not, thereby, become for all purposes whatever a member of such company, he is, as between himself and the \*other members, a contributory \*183 under the Winding-up Acts. How can it be said that no liability attaches to the acceptance and allotment of shares, when the letter of application is plainly the offer of a contract, which becomes complete when that offer is itself accepted by the shares being allotted? In this way a common law liability arises, and therefore, independently of the statute, the applicant, who becomes the allottee, incurs a liability in virtue of his contract itself. *Brittain's Case*<sup>1</sup> is decisive on this subject. Even taking the same ground of argument as that adopted on the other side, it is clear that these parties are liable. First of all, there is a contract by offer and acceptance, — a contract on which, in ordinary transactions, the party making the offer, which was afterwards accepted, would be liable at common law; and, next, it is clear that if there is not a common law there is an equitable liability. The offer and acceptance would form a ground for a bill for specific performance. If so; then, assuming the last decision in *Besley's Case*<sup>2</sup> to be correct, and the liability of these parties to be determinable on legal and equitable principles alone, and without reference to statutory enactments, the liability exists here.

But it is clear, secondly, that the statutes do apply to a case of this kind, for the words in the second Act (11 & 12 Vict. c. 45), "every association divided into transferable shares," which define the objects of the statute, must include an association of this kind. The respondents are members of such an association. The Act 7 & 8 Vict. c. 110, shows what payments are first to be made, but it plainly assumes that others will be necessary, for it provides that the original depositors shall be repaid, if the sums deposited shall be more than is sufficient for what is required.

\*The cases of *Woolmer v. Toby*<sup>3</sup> and *Willey v. Parratt*<sup>4</sup> \*184 both establish the liability of these respondents. In the first the existence of the liability was not doubted, but the persons who there sued were not the persons to enforce it, and there-

<sup>1</sup> 1 Simons N. S. 281.

<sup>2</sup> 10 Q. B. 691.

<sup>3</sup> 15 Jurist, 523.

<sup>4</sup> 3 Exch. Rep. 211.

fore a nonsuit was entered. In the second, the existence of an absolute contract was the real bar to the plaintiff's right to recover, for, by that contract, he was held to have authorised the expenditure of the deposits. The case of *Hutton v. Upfill*,<sup>1</sup> too, must be actually overruled, if the order of the Vice-Chancellor in this case is not reversed.

THE LORD CHANCELLOR. — It has been thought convenient and desirable that these two cases should be argued as one case, the only distinction between them being, that in the case of *Hutton v. Thompson* the respondent paid the required deposit, upon receiving information that certain shares in the proposed concern had been allotted to him, whereas the defendant in *Norris v. Cooper* took no notice whatever of the letter of allotment. In all other respects the two cases are identical, and accordingly the argument has proceeded, as well upon the effect of the facts which are common to both cases, as upon the effect of the additional fact of the payment of the deposit by the defendant Thompson. Your Lordships will observe, however, that another point has been argued, which not only applies to the two cases before your Lordships, but to all the proceedings which have taken place under the orders of reference made for the winding up of the companies, inasmuch as it has been contended that the proposed companies had never been matured to a sufficient extent \*185 to render them subject to the jurisdiction created by the statutes called the Winding-up Acts. This latter question it may not be necessary for your Lordships to consider,<sup>2</sup> because, if the facts common to the two cases should lead to a conclusion favourable to the respondents, your Lordships may not think fit to express any opinion upon a matter of so much importance, the determination of the two cases not requiring a decision of that question.

I submit to your Lordships that it is desirable that you should have the benefit of the opinions of the learned Judges upon certain questions, the answers to which, if they shall conform to the arguments on the part of the respondents, will lead to the conclusion that both appeals ought to be dismissed ; and those questions are the following :

1st. Ought the name of A. B. (under the circumstances set

<sup>1</sup> 2 House of Lords Cases, p. 674.

<sup>2</sup> See *Bright v. Hutton*, post, at p. 354.

forth in the accompanying certificate) to be included in the list of contributories of the company mentioned in such certificate ?

“A provisional registration was made, under the Statute 7 & 8 Vict. c. 110, of a proposed company, in the name of the direct Birmingham, &c. Railway Company. The accompanying prospectus was registered and published. Certain persons acted as a committee for the establishment of the company, and to obtain an Act of Parliament. Individuals applied to that committee for an allotment of shares, and the committee accordingly did allot shares to the applicants, and among them twenty shares to A. B. Such application and allotment took place in consequence of the accompanying correspondence.” (The learned Judges have the papers before them, and will refer to that correspondence.<sup>1</sup> “A. B. took no steps \* after the application for shares, and \* 186 neither paid the required deposit, nor signed any subscribers’ or parliamentary contract.”

Ought A. B. to be considered as a contributory within the intent and meaning of the said Acts ?

2d. The second question which I propose should be submitted to the Judges will be to the same effect, and upon the same state of facts, except that it will omit the statement that A. B. took no steps upon the letter of allotment, and substitute the fact that A. B. after the receipt of the letter of allotment, paid the required deposit, but did not sign any parliamentary or subscribers’ contract.

As it may be possible that the answer of the learned Judges to both these questions may be in the affirmative, I propose to put the following question :

3d. Under the provisions of the 7 & 8 Vict. c. 110, certain promoters provisionally registered a proposed railway company, with a large specified capital, to be divided into shares, and certain persons assumed to act as a committee for the purpose of establishing the company, and allotted shares to individuals who made applications for them. The committee incurred considerable expense, and contracted debts in the preparations to obtain an Act of Parliament, but not being able to procure payment from a sufficient number of shareholders, though a sufficient number of shares had been allotted to form the proposed company, the project was abandoned. Did the above circumstances constitute an association, a

<sup>1</sup> Vide supra, p. 167.



company, or partnership within the meaning and intent of the several statutes made for the winding-up of Joint Stock Companies? And would it make any difference if the committee which contracted the debts consisted of less than seven in number, or that no joint debt was contracted by seven or more?

\*187 \*As I have before stated, it is desirable to obtain the opinion of the learned Judges upon these three questions; but how far your Lordships may deem it expedient to enter upon the consideration of the third question, you may determine after you shall have received the answers of the learned Judges to the first and second questions.

The learned Judges retired to consider those questions, and on their return to the House,

THE LORD CHIEF BARON delivered their opinion. — The Judges have considered the questions proposed by your Lordships, and I have to report their answers to the first and second questions; they desire time to deliberate as to the third which your Lordships have submitted to them. Upon the first and second questions I have to report the unanimous opinion of the Judges who have heard the argument, that neither in the case where shares were applied for, and no payment of deposit was made, nor in the case where a payment of deposit was made, but there was no signature of the subscribers' or parliamentary contract, ought the name of the party to be included in the list of contributories of the company mentioned in such certificate. We think that the mere fact of the applicant being an allottee of shares under the circumstances set forth in the certificate (assuming that he was an allottee, as to which we give no opinion, and as to which several of us doubt), did not make him responsible for any of the preliminary expenses incurred before the abandonment of the undertaking. We think this was clearly the law prior to the Statute 7 & 8 Vict. c. 110, and that none of the provisions of that Act made any alteration in the law upon this subject, so as to render an allottee of shares liable beyond what his own contract had done,

\*188 or to \*give to his acts or conduct a construction different from what they would otherwise receive.

THE LORD CHANCELLOR. — Your Lordships have to thank the learned Judges for the very distinct and important opinion which they have delivered upon the first and second questions, which

probably may render it unnecessary that they should be troubled with the consideration of the third question ; that your Lordships will have to determine. The opinion which the learned Judges have presented to your Lordships will be for your Lordships' serious consideration, and I propose that the further consideration of the cases be adjourned.

August 8.

THE LORD CHANCELLOR. — These cases are appeals from orders of the Vice-Chancellor, Lord Cranworth, reversing the orders of the Master, to whom were referred the adjustment of the affairs of two projected railway companies, under the authority of what are called the Winding-up Acts.

The cases have been lately argued at your Lordships' bar, but it may be convenient that the facts should be revived in your Lordships' recollection. Each of the respondents had shares allotted to him in the projected companies, the respondent Cooper in the Wolverhampton, Chester, and Birkenhead Junction Railway Company, and the respondent Thompson in the Birmingham, Oxford, Reading, and Brighton Railway Company, and the only distinction in fact between the two cases is, that the respondent Thompson paid the required deposit upon the shares allotted to him, but the respondent Cooper neither paid deposit nor did any other act after the allotment to him of the shares.

The questions of law for your Lordships' decision in \* the two cases were identical, and they were therefore, by \* 189 consent of the parties, heard together. In *Hutton v. Thompson* the additional fact existed, tending to show the respondent's liability, of his having paid the deposit upon the shares allotted to him, and it follows, that if your Lordships shall be of opinion that the appeal in that case cannot be sustained, the decision in that case will govern the case of *Norris v. Cooper*. It will therefore be sufficient for me to state to your Lordships the material circumstances and arguments which are applicable to the case of *Hutton v. Thompson*. Those facts are as follows : —

In the year 1845, some persons published a prospectus, proposing to construct a railway from Birmingham to Oxford by means of a company or association, with a capital of 2,000,000*l.*, divided into 80,000 shares of 25*l.* each.

The project was provisionally registered under the Statute of the 7 & 8 Vict. c. 110. The prospectus set forth certain names as

constituting a provisional committee, and it contained a form of application for shares.

About the end of October, 1845, the respondent Thompson applied for an allotment of 20 shares, and the shares were allotted to him accordingly, of which he was informed by a letter dated the 18th of October, which is set forth in the printed cases, and which I will read. (His Lordship read the letter.)

Upon the receipt of this letter, Thompson paid the deposit of 2*l.* 12*s.* 6*d.* per share to one of the bankers named in the letter, but never exchanged the banker's receipt for scrip, nor executed any parliamentary contract or subscribers' agreement, and none such was ever prepared. Seventy thousand shares were allotted

by some persons acting as a committee, and the deposits,  
 \*190 \* by a letter similar to that which I have read, were required to be paid on or before the 24th of October, 1845, or, as the letter stated, the allotments were to be null and void. Deposits were paid upon 4295 shares only, it was therefore found impracticable to establish the company, and the project was abandoned.

On the 21st December, 1849, an order was made under the statutes before mentioned, and the Master afterwards acting under that order, inserted the name of the respondent Thompson in the list of contributories to the company, in which shares had been allotted to him, and he had paid the deposit on them. Against that insertion of his name, the respondent appealed to the Vice-Chancellor, Lord Cranworth, and his Lordship reversed the decision of the Master, and the present appeal is presented by the official manager against that order of reversal.

The question which arises upon these facts is, whether the name of the respondent Thompson was properly inserted in the list of contributories.

In support of the appeal it has been contended, that by the application for shares, the allotment pursuant to such application, and the payment of the deposit upon the shares so allotted, the respondent became a member of the company, and, as such, liable to be put upon the list of contributories, and it is argued, that by § 3 of 11 & 12 Vict. c. 45, the Winding-up Act of 1848, "contributory" includes every member; and member is declared to mean any person entitled to a share of the assets or accruing profits of the company. And that, as by the 7 & 8 Vict. c. 110, § 3, the

word "subscriber" is declared to mean any person who shall have agreed to take shares in a proposed company, therefore, the respondent, being a subscriber within the one definition, \* must be taken to be a member, and consequently a con- \* 191 tributary, within the other.

But this conclusion by no means follows, because the conditions prescribed, upon which he was to become a member, and to become entitled to any participation in the profits of the adventure, were, that besides the payment of the deposit, he should sign the Parliamentary contract, and the subscribers' agreement, and exchange the banker's receipt for scrip, whereas, although the respondent did pay the deposit, he did not perform either of the other conditions; and, according to the decisions which have taken place again and again, in all the Courts of Westminster, upon the abandonment of the project, the respondent was not liable to an action at law at the suit of any creditor of the company.

Upon the part of the respondent it was argued, that he had agreed to become a subscriber for shares, conditionally upon a company being established, with the proposed capital of 2,000,000*l.*, divided into 80,000 shares of 25*l.* each, as proposed in the prospectus; but that no such company ever was, or could be established, and therefore, the whole condition and consideration upon which he agreed to become a shareholder failed, and by such failure, it became impracticable for him ever to obtain the shares which he had agreed to take, and that so far from being liable to contribute to the expenses or debts incurred by the promoters, who had ineffectually endeavoured to establish the company, he was entitled, according to the case of *Walstab v. Spottiswoode*,<sup>1</sup> and to what is now the established law in Westminster Hall, to recover back the deposits paid, and that it would be a proposition \* contradictory in itself to hold that payments made by the \* 192 respondent, subjected him to further responsibility, when, in point of law, such payments were recoverable back on the ground of a failure of consideration.

The answer thus urged appears to me to be a valid answer in point of law, and that the acts of the respondent, and the other circumstances relied upon in support of the appeal, subjected the respondent to no other obligation or responsibility than being bound to take certain shares in such a company as that proposed

<sup>1</sup> 15 Meeson & Welsby, 501.

by the prospectus to be formed, in the event of it being in fact established, but which never took place.

The case of *Hutton v. Upfill*,<sup>1</sup> decided by this House, was cited and relied upon on the part of the appellant; but in regard to that case, it is only necessary to say at present that it is an authority rather against the appellant than for him, for by that judgment Upfill was held to be a contributory, expressly upon the ground of the conjoint effect of the two facts, which existed in it, and those facts were that he was a member of the provisional committee, and had also paid deposits upon shares; the language of the judgment being, that it was the case of a "provisional committee-man *plus* his acceptance of shares," and it clearly appears from the judgment, that if either of those facts had been absent, the opinion of the noble Lord who pronounced the judgment would have been against the appellant.

The case of *Nockells v. Crosby*<sup>2</sup> long ago decided that the preliminary expenses of an abortive scheme must be borne by the projectors, and cannot be thrown upon those who agreed to become shareholders in a projected company which was never established.

\*193 \*This case was argued in the presence of the learned Judges. Your Lordships were pleased to put questions to them, to which they gave an answer, and which question and answer I beg to repeat to your Lordships. [His Lordship read them.]

The opinion which I have just read is in conformity to what has been established in a variety of cases, and consistent, as I believe, with sound law, and I perfectly concur in that opinion; and if your Lordships think fit to adopt it, you will come to the conclusion that the present appeal ought to be dismissed, and accordingly I move your Lordships that in the case of *Hutton v. Thompson* the appeal be dismissed, with costs.

*Ordered accordingly.*

In the case of *Norris v. Cooper*, which, by the absence of the fact of the payment of deposits, is less strong than the case of *Hutton v. Thompson* (which your Lordships have just disposed of), I also move your Lordships that the appeal be dismissed, and with costs.

*Ordered accordingly.*

<sup>1</sup> 2 House of Lords Cases, 674.

<sup>2</sup> 3 Barnewall & Cresswell, 814.

## BRIGHT v. HUTTON. — HUTTON v. BRIGHT.

These were cross appeals. The first was presented by Mr. Bright, who was alleged to have been a shareholder in the Direct Birmingham, Oxford, and Reading Railway Company, and the second by the official manager appointed to wind up the affairs of that company. Both were brought against an order pronounced by Vice-Chancellor Lord Cranworth, who had pronounced it at the express desire of both parties, in order that it might at once be subjected to consideration in the House of Lords. An application was made to the House that the appeals might be heard immediately, and the application \* being granted, \* 194 they were argued on Wednesday the 6th of August. The liability of Mr. Bright to be placed on the list of contributories was assumed to be established, and the question argued was as to the mode of calculating the amount of the contribution which he was bound to make in respect of that liability.

The Judges were not present at this argument. On the 8th of August,

The Lord Chancellor said, that as the question involved in this case depended on the construction of Winding-up Acts, and several different modes of calculating a contributory's liability might be suggested, it would be most proper that the House should have the advantage of the assistance of the Judges. As it was impossible to have that assistance at that moment, all the Judges being absent on circuit, and the session being just about to close, he thought the only proper course would be, to postpone the further consideration of the case till the next session, and he moved that it should be so adjourned.

Lord Cranworth expressed his entire concurrence with the course recommended by the Lord Chancellor.

*The further consideration of the case was ordered to be adjourned accordingly.*

## \*PRENDERGAST v. PRENDERGAST.

\* 195

1850. August 7, 8, 9.

G. L. and C. G. PRENDERGAST, W. and DORA	}	<i>Appellants.</i>
SIMPSON, and MARY SWINTON,		
ELIZA EMMA PRENDERGAST, HARRIS PRENDERGAST,	}	<i>Respondents.</i>
and others,		

*Will. Construction. Trustees not acting. Rule of Court. Conversion of Funds. Costs.*

Where trustees are directed to pay a certain sum to a person for life, and are empowered according to their discretion to invest the trust funds out of which that sum is to arise, but decline or neglect to act, and the assistance of a Court of Equity is sought in order to carry into effect the purposes of the will, the Court will not, as a matter of course, exercise that discretion, but will only act

on its established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding.

A testator, after making certain specific bequests, proceeded as follows : " I give and bequeath to my trustees hereinafter named, so much of my personal estate and effects as, at the time of my decease, shall produce the clear annual income of 1500*l.* : and I direct that the same shall be selected and appropriated and set apart as soon as may be, &c. by my said trustees, in their uncontrolled discretion, upon trust to pay " to his wife the dividends during her life or widowhood, and after her death or second marriage, the same was to become part of his residuary personal estate. He directed that if the annual produce so appropriated should be increased or reduced in amount, his wife was to receive the increased or reduced dividends, as the case might be, in lieu of those before directed to be paid to her. The trustees were fully empowered at their discretion to permit the personal estate to continue on the same securities as at the time of his decease, or to sell and reinvest, as the testator himself might do. Some of the foreign funds ceased to pay any dividends, and the trustees refused to exercise their discretion as to altering the investments, but submitted to act as the Court should direct.

The Court refused to exercise the discretion vested in the trustees, but acting on its general rule in such matters (as the testator had not expressed a different intention) directed the annuity to be raised by the purchase of an adequate sum in consols, and ordered the Master to inquire, having regard to the interests of other parties under the will, what investments must be called in to effect this object : —

*Held*, that the decree thus made was correct.

The costs of the appeal were ordered to come out of the estate, but the trustee having unnecessarily printed certain documents for the hearing of the appeal, the costs of such printing were disallowed.

THE question involved in this appeal, arising upon the construction of the will of Guy Lenox Prendergast, was,  
 \* 196 \* whether an annuity thereby given to his widow should be paid out of the interest of so much of his personal estate as was producing, at the time of his death, in its then state of investment, an annual income of 1500*l.* ; or whether an annual income of that amount should be reserved to her, by a sale of a sufficient portion of such personal estate, and a reinvestment of the proceeds in the purchase of 50,000*l.*, in three per cent. consols.

The testator by his will, dated the 3d of April, 1839, after directing payment of his debts, funeral and testamentary expenses, and bequeathing to his wife (the respondent Eliza Emma Prendergast), the sum of 2000*l.*, together with a leasehold house, furniture, and other effects, as therein mentioned, and confirming the settlement made upon their marriage, gave and bequeathed as follows : —

"I give and bequeath to my trustees hereinafter named so much of my personal estate and effects as at the time of my decease shall produce the clear annual income of 1500l.: and I direct that the same shall be selected and appropriated and set apart, as soon as conveniently may be after my decease, by my said trustees or the trustees or trustee for the time being or the majority of them residing in England in their uncontrolled discretion: and I direct that my said trustees and the trustees or trustee for the time being under this my will do and shall stand and be possessed of the personal estate and effects so to be appropriated and set apart, upon trust to pay the interest, dividends, and annual produce thereof, by equal half-yearly payments, unto my said dear wife during her life, if she shall so long continue my widow; the first of such half-yearly payments to begin and be made at the end of six calendar \* months next after my \* 197 decease: and from and after the decease or second marriage of my said wife, I direct that the personal estate and effects which shall be so appropriated and set apart, or the stocks funds or securities in or upon which the same shall then be laid out or invested, shall sink into and become part of my residuary personal estate: and I direct that in case the yearly interest, dividends, and annual produce of the personal estate and effects so to be appropriated and set apart as aforesaid, or the stocks funds or securities in or upon which the same shall or may at any time or times hereafter be laid out or invested, shall from any cause whatever be increased or reduced in amount during the time the same are hereby directed to be paid to my said wife, then and in such case my said wife shall be entitled to have and receive such increased or reduced interest dividends and annual produce as the case may be, in lieu and satisfaction of the interest dividends and annual produce hereinbefore directed to be paid to her."

The testator then bequeathed all the residue of his estate to his trustees, upon trust to divide the same equally among his children who should be living at his decease, whether by his first or second marriage, their shares to be paid or vested as in the will mentioned; and after declaring that the several provisions by the will made for his wife and children by his second marriage, were in addition to the benefits they might be respectively entitled to under his marriage settlement: and after making provision for the maintenance and advancement of such of his children whose shares



should not have become vested at the time of his decease as therein mentioned, the testator further declared as follows : —

\*198 \* “ And I hereby direct that it shall and may be lawful

for, and I do hereby expressly authorise and empower my said trustees and the trustees or trustee for the time being under this my will or the majority of them resident in England at their own discretion to permit the whole or any part of my personal estate to be and continue on such securities as the same may happen to be invested at the time of my decease, so long as they see fit, without being in any way answerable or responsible for so doing: nevertheless I do hereby fully authorise and empower my said trustees or the trustees or trustee for the time being or the majority of them resident in England to sell and absolutely dispose of or convert into money such part or parts of my personal estate and effects as shall not consist of money or securities for money, and call in recover and receive such part or parts of my said personal estate and effects as shall consist of money or securities for money, when and as they my said trustees or trustee for the time being shall in their discretion think fit, and to lay out and invest the money so to be raised and received in the public stocks or funds of Great Britain or on government or real security at interest, and from time to time to alter vary and transpose the stocks funds and securities in or upon which the same shall or may be laid out and invested and again to reinvest and lay out the money arising thereby upon any new or other or the like stocks funds or securities as often as they my said trustees or trustee for the time being or a majority of them resident in England shall in their own absolute discretion think fit and advisable, and generally to act in the premises in as full and ample a manner as I could do were I living. And I direct that my said

\*199 trustees or trustee shall stand and \* be possessed of and interested in all such stocks funds and securities, and the dividends interest and annual produce thereof, upon such trusts and for such intents and purposes as are hereinbefore expressed and declared of or concerning the trust funds and premises given to or vested in them as aforesaid, and the dividends interest and annual produce thereof respectively.”

The testator appointed his wife (the respondent), his brother in law, Sir James Law Lushington, his sons, the appellants, Guy Lushington Prendergast, and Charles George Prendergast, his

brother Sir Jeffery Prendergast, and his nephew the respondent Harris Prendergast, executors and trustees of his will. The will contained the usual clauses for indemnifying and reimbursing the trustees, and for the appointment of new ones if necessary.

The testator, by a codicil dated the 3d of August, 1840, confirmed his will, and died in February, 1845, leaving his sons, and two daughters, his only children by his first wife (the appellants in the cause), and Emma Maria Prendergast, his second wife, Louisa Lenox Prendergast and Lenox Prendergast, his only children by that wife (the respondents), him surviving.

The will and codicil were proved in March, 1845, by Harris Prendergast alone, power being reserved for the widow and the other four executors named in the will, who were then residing abroad, to come in and prove the same.

The testator's personal estate at the time of his death, besides his dwelling-house and furniture bequeathed to his wife, and 10,500*l.* consols, vested in trustees for her jointure, consisted of investments in foreign stocks,<sup>1</sup> the interest of which, while they produced \* any, gave an income of 4894*l.*, but some \* 200 of them had altogether ceased to pay interest, and their value was fluctuating.<sup>2</sup> Under these circumstances Mr. Harris Prendergast, acting as sole executor and trustee, refused, without the direction of the Court of Chancery, to make the selection and appropriation of stocks directed by the will, for securing the provision thereby made for the widow. A bill was filed by her against him and the other executors, and against the children of the testator's first and second marriages. The bill prayed that the trusts of the will might be carried into execution, under the direction and decree of the Court, and that it might be declared that the plaintiff was entitled to have so much of the testator's personal estate set apart, appropriated, and invested in the public funds, or upon real security in England, as would yield a permanent annuity or clear yearly sum of 1500*l.*, and that such appropriation and investment might be effected forthwith.

All the defendants to the bill, except the appellants, — the testator's children by his first wife, — who were residing out of the jurisdiction, put in their answers. The testator's children by his second marriage, answering by their guardian, submitted the

<sup>1</sup> Vide post, p. 202.

<sup>2</sup> See 5 Hare, p. 171.

question of the plaintiff's claim to the judgment of the Court. Two of the executors, Sir J. L. Lushington and Sir J. Prendergast, renounced the trusts of the will, and disclaimed all interest in the matters in question.

Mr. Harris Prendergast by his answer stated, that he had possessed himself of part of the testator's personal estate, and there-out paid his debts, and also the legacy of 2000*l.* bequeathed \* 201 to the plaintiff; but, as \*sole executor and trustee, he refused to carry into execution such of the trusts of the will as to which there existed doubts and differences of opinion between the parties; and after stating the nature of the testator's personal estate, and that the dividends and value thereof were fluctuating and uncertain, he submitted it as a question of construction and matter of law, to the decision of the Court whether there was a clear and manifest intention shown by the will that the trustees should set apart and appropriate so much of the testator's personal estate as would secure a permanent sum of 1500*l.* a-year to the plaintiff for her life or widowhood; and whether the trusts and powers, by the will vested in the trustees, were explicit and ample enough to authorise them, or him as sole executor and trustee, to sell out so much of the testator's foreign stocks as, when converted into public funds or real securities of the country, would yield a clear permanent annual sum of 1500*l.* to the plaintiff. And he stated that he was advised and believed that there was so much obscurity and difficulty in the language of the will, that it would be hazardous for him, and injurious to the interests of all the parties claiming under it, if he were to take on himself the execution thereof, without the assistance and protection of the Court; but that having himself no beneficial interest under the will, he would, upon receiving such assistance and protection, act as the Court should direct.

The cause was heard by Vice-Chancellor Sir James Wigram, in the absence of the appellants, in April, 1845, when it was ordered that the bill should be dismissed as against Sir J. L. Lushington and Sir J. Prendergast; and it was referred to the Master, after making certain preliminary inquiries, and taking the usual \* 202 \* accounts of the testator's personal estate, to inquire what parts of such estate were then outstanding and invested in any and what foreign stocks or securities, and whether any and what parts thereof as were so invested ought to be sold; and it

was ordered that such parts thereof as the Master should be of opinion ought to be sold, should be sold by the acting executor.

The Master by his report, dated in December, 1845, found, among other things, that many parts of the testator's estate then outstanding were invested in foreign funds, and produced the income stated below : —

	Income.	
	Dols.	£
Mississippi 6 per cent. stock . . . . .	21,000	
Pennsylvania 5 per cent. stock . . . . .	22,000	220
Maryland 6 per cent. stock . . . . .	20,000	
Louisiana 5 per cent. bonds, redeemable in 1853 . . . . .	24,000	270
Louisiana 5 per cent. bonds, redeemable in 1867 . . . . .	85,000	
New Orleans City 5 per cent. bonds . . . . .	40,000	
Alabama 5 per cent. bonds . . . . .	24,000	240
	£	
Alabama sterling bonds . . . . .	11,000	550
Upper Canada debentures . . . . .	5,000	250
Converted Portuguese 5 per cent. bonds . . . . .	37,000	1200

And as to that part of the decree directing inquiry whether such parts of the testator's estate as were vested in foreign stocks, or any part thereof, ought to be sold, the Master certified that the parties before him had waived proceedings in that inquiry.

The cause was heard on further directions in January, 1846, by the same Vice-Chancellor, when his Honour, by his decree of that date, declared that the bequests to such of the testator's daughters living at his death, as should be married, were for their respective separate use; that according to the true construction of the \* will the plaintiff was entitled to have \* 203 so much of the testator's personal estate invested in 3l. per cent. consols, as should be sufficient to produce a clear income of 1500l. a-year; and it was referred to the Master to inquire, and state what parts of the testator's personal estate ought, having regard to the interests of all parties, to be sold for the purpose of purchasing such consols sufficient to answer such annuity.

Shortly after the date of this decree the appellants came within the jurisdiction, and having obtained leave to appear and answer the bill, and consenting to be bound by the proceedings and orders had in the cause up to that time, subject nevertheless to their right of appeal therefrom, they put in their answer, and thereby submitted that the manifest intention of the testator, as apparent in his will, was that his executors and trustees should not sell out

so much of his foreign stocks or other personal estate, as, when converted into the public funds or invested in real securities in this country, would yield a permanent annuity of 1500*l.*, but that his intention was that none of his securities should be sold for such purpose; but that a sufficient portion of the existing securities at his death should be set apart and appropriated for the purpose, and that the annual amount to be paid to the plaintiff in respect of the annuity should thereafter be dependent on the annual amount of the interest of the securities so appropriated.

The cause was again heard by the Vice-Chancellor, between the appellants and Mrs. Prendergast, in July, 1846, when his Honour pronounced a decree in the same terms as the decree of January, 1846, above stated.

The appellants then appealed to the Lord Chancellor,  
 \* 204 \* who affirmed the decree and dismissed the appeal, and ordered the costs of all parties to be paid out of the testator's residuary estate.

The appellant Charles George Prendergast, one of the executors, availing himself of the power reserved to him, proved the will and codicil, and having, with the other appellants, applied for a rehearing of the appeal before the Lord Chancellor's order was drawn up, his Lordship heard the cause reargued, and finally disposed of it in January, 1847, by again ordering the Vice-Chancellor's decree of July, 1846, to be affirmed, with costs of this rehearing, to be paid by the appellants.<sup>1</sup>

<sup>1</sup> The following is an abridgment of the short-hand writer's notes of his Lordship's judgment: —

THE LORD CHANCELLOR. — In permitting this case to be spoken to, and, as it turned out, to be entirely reargued, I yielded to what I supposed to be the strong opinion of eminent counsel, and not from any doubt which occurred to my own mind as to the opinion which I before expressed. I have however so far profited by that reargument that I have again looked through the will. I have considered the reasons on which the decree of Vice-Chancellor Wigram was founded, and I have also now read the pleadings, and I have read what escaped my attention before, the original decree, which I think, if it had been attended to, would have formed a very important ingredient in the consideration of this case, that not being the subject of appeal, the appeal being confined to the decree on further directions. Now the question being under the will, by which, without now adverting to the particular expression I used, the general object was to give the plaintiff 1500*l.* a-year. I will not call it an annuity, because that has been the subject of comment, but he meant undoubtedly that his widow should have 1500*l.* a-year, payable out of some portion of the estate, and that, subject to the

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so much of the Vice-Chancellor's orders of January and

payment of that 1500*l.* a-year, the property was given to the children of the two marriages, and the sum, whatever it might be, to be set apart to answer the 1500*l.* a-year to the widow, was, after her death, to fall into the residue.

That is the general purport of the will: and the question is, whether that 1500*l.* a-year is to be provided for out of the estate in the way in which like provisions of that description usually are, or whether the testator has by his will expressed an intention that it shall be provided for by an appropriation at the time of his death, or immediately on his death, of some portion of such funds as might actually then be in a state of investment and producing income; it must be producing income, otherwise the argument will not hold. No doubt it was quite competent to the testator to make such a provision; it would be a very irrational provision, and it would be one which would be likely to defeat the general object which he had in his will, of producing a life estate for the widow, and afterwards, subject to that life estate, making a provision for the children. Still, if the testator, who was master of his own property, thought proper so to dispose of his property, there can be no doubt as to his competency so to do, and the Court would then be bound to carry it into effect as far as by the rules of the Court it was possible to do. But that, of course, is a matter of construction, and without saying that it requires expressions that leave no doubt, it is a construction which the Court would not very readily accede to, and would only do so if the intention were so essentially clear as that there could be no doubt of miscarriage in adopting that mode of administering the fund. Now it is obvious, and that was conceded in the argument, that if that be so, the funds when set apart would be funds which could not be afterwards altered during the period of the life of the widow, because it would and must proceed entirely on this supposition, that it is a specific appropriation either directly by the testator or through the means which he has directed, and that when that appropriation takes place it is to all intents and purposes a specific appropriation of the income of the funds so set apart, to the wife for her life and afterwards to be divided amongst her children. That would, for the purpose of any discretion which the trustees might have; it would be just the same as if the testator had directed the income to be enjoyed by the widow for life, and afterwards to go amongst the children. If there be in this will a discretionary power to vary the funds, it might afford at least a strong argument of inference of intention that there was no such specific appropriation of particular funds intended, but the object was to provide for the income of the wife without reference to the appropriation of any such funds as might be existing at the time of the testator's death. If that was the construction of the will, and if the trustees having once appropriated the funds, had no discretion afterwards to vary them, but being appropriated, they became the separate property for life of the widow, the Court of course would have no more discretion to vary the fund than the trustees would have, and the trustees having declined to act, and the duty devolving on the Court of doing that which the trustees ought to do, there is no difficulty whatever in the Court exercising that discretion, namely, of inquiring which of the funds existing at the time of the death were funds proper to set apart for the purpose of answering the 1500*l.*

July, 1846, as are above set forth (except the declaration  
 \* 206 that the bequests to such of the testator's daughters, \* living

a-year. That would be merely executing the trust, a trust with a specific direction; it would be a trust without a power; there would be none of that discretion to be exercised in the performance of that duty which has been considered as personal to the individual named by the testator, and therefore not capable of being exercised by the Court or devolved to others. If therefore that is the construction, there would be no difficulty in the Court executing that; it might execute it by directing the Master to inquire which of the funds existing at the time of the death were proper to be set apart for producing the 1500*l.* a-year.

Now before I proceed to make any observations on the will itself, I would state what the decree, not the decree on further directions appealed from, but the decree not appealed from, and which therefore, as the matter stands, must regulate the rights of the parties. By that decree, after directing the usual inquiries and accounts, it was "ordered that the Master should inquire and state to the Court what parts of the testator's estate were then outstanding and invested in any and what foreign stocks or securities, and whether such parts of the testator's estate as were then outstanding and invested in any foreign stocks or securities, or any and what parts thereof, ought to be sold. And it was ordered that such parts thereof as the Master should be of opinion ought to be sold, be sold by the defendant Harris Prendergast." The Court has put a construction on the will, for the Court has declared — and that decree as it stands is binding on all parties — that if the Master shall find that it is not expedient that the property shall remain, — which of course he must find, because he could not find otherwise, although he has not made any report on that part of the case, — if he shall find that it is not expedient that the estate on which the life interest is charged, with remainder to the two families of children, shall remain on the security of these foreign stocks, why then he is without any further direction of the Court to proceed to sell. How is it possible, in the face of that decree, for this Court to say that that is not the construction of the will, the Court having declared that that is the construction of the will? And having dealt with the fund as liable to be disposed of, how can the Court say that the funds are not liable to be disposed of? Whether the investment is good or bad, whether beneficial to the tenant for life or to those in remainder, or whether it be not, it must remain in the state in which the testator left it, after once being appropriated for the life of the widow: if I was of a contrary opinion, on looking at the will, from what I find to be the declaration of the Court on the original decree, it might no doubt create some embarrassment and might give rise to further proceedings: but that which was the declared opinion of the Court, and which now exists as the decree of the Court, is quite consistent with the view I take of this will; and without saying that there are not expressions in the will which give rise to the argument, and which are not so free from difficulty as other expressions that might have been used, on looking at the whole of this will together, I have no doubt whatever, as I expressed before, that there is no such expression of intention as makes it the duty of the Court, or is sufficient to induce the Court, if it had the power of putting that very extraordinary construction upon it, namely, of keeping these foreign securities as the means out of which the 1500*l.* a-year is to be raised.

at his death as should be married, were for their separate use) ; and also against so much of the decree of April, 1845, as referred it to

The testator commences his will by providing for his wife: he says, "I give and bequeath to my trustees, hereinafter named, so much of my personal estate and effects as at the time of my decease shall produce the clear annual income of 1500*l*." Now if it stopped there, no argument could have been raised, because these really would have been ordinary terms. Then we have only to look, if that be the gift, at what is the mode of investment according to the rules of this Court. What are the funds? In what state of investment ought they to be, in order to provide for the tenant for life, where the principal is left to other persons, after the death of the tenant for life? And then he goes on, "and I direct that the same shall be selected, and appropriated and set apart, as soon as conveniently may be after my decease, by my said trustees, and in their uncontrolled discretion."

Now I must observe here, the question is not whether the trustees had by this will a discretion as to whether the property should remain in the foreign funds or not, but it is whether they are directed after once having appropriated the funds to answer the annuity, that they shall remain there; because if it is merely a matter of discretion whether they should be in one fund or another, and the expressions are not certainly confined to the funds as they stood at the time of the death, then it is no more than the discretion which the trustees had, and which they declined to exercise, and which devolves on the Court; and the Court has a rule in regulating its conduct in the exercise of that sort of discretionary trust. "And I direct that my said trustees, and the trustees or trustee for the time being under this will, do and shall stand and be possessed of the personal estate and effects so to be appropriated and set apart, upon trust, to pay the interest, dividends, and annual produce thereof, by equal half-yearly payments, unto my said dear wife during her life, if she shall so long continue my widow, the first of such half-yearly payments to begin and be made at the end of six calendar months next after my decease; and from and after the decease or second marriage of my said wife, I direct that the personal estate and effects which shall be so appropriated," — not speaking of funds or securities specifically, but always using the term "personal estate," — "shall be so appropriated and set apart, or the stocks, funds, and securities upon which the same shall then be laid out and invested, shall sink into and become part of my residuary personal estate." Here then we have an expression which has been observed upon, and which certainly is entitled to considerable weight: he considers, whatever the intention is as to that existing fund or the fund to be procured, he certainly contemplates such an appropriation immediately after his death. He now is referring to what the state of the fund might be at the time of the wife's death, and then he speaks of funds or securities in or upon which the sum which is to secure the 1500*l*. a-year shall then be laid out and invested, he directs that it shall fall into and form part of his residuary personal estate. No doubt he might have used the expression without referring to the thing by which the state of investment might be varied at a period immediately following his own death, and the death of the wife. Still, it is much more consistent with the supposition that he intended the trustees should have a dis-



the Master to inquire whether any and what parts of the testator's estate as were outstanding in foreign stocks ought

cretionary power to vary the funds, which the trustees ordinarily have, and must have, unless their duty be controlled by the express authority of those from whom they derived their power. "And I direct that in case the yearly interest, dividends, and annual produce of the personal estate and effects so to be appropriated and set apart as aforesaid, or the stocks, funds and securities in or upon which the same shall or may at any time or times hereafter be laid out or invested, shall from any cause whatever be increased or reduced": then the wife is to bear the burthen of that reduction, and she is to have the benefit, if it be increased. Does he not here contemplate the possibility at least of a variation of the fund? He tells you so. It is not the funds so appropriated; if they shall fall the wife shall bear the burthen, but it says, "the funds so to be appropriated and set apart as aforesaid, or the stocks, funds or securities in or upon which the same shall or may at any time or times hereafter be laid out or invested," and which may from any cause whatever be varied. In both these sentences he contemplates a variation of the investment as it may have existed at the time of the appropriation taking place.

Now those are very material passages to be attended to, but not containing the whole evidence that there is of the testator's intention. Because, when I come to look at the third clause of the will, which gives a general power to the trustees, I find it perfectly consistent with the obvious meaning of these two particular clauses which I have referred to, and quite inconsistent with the supposition that the particular portion of the personal estate required to produce the 1500*l.* a-year was no longer to be under the control of the trustees for the purpose of varying the securities, but was unchangeably devoted during the life of the widow to remain in the same identical state of investment for the purpose of answering the 1500*l.* a-year. "And I do hereby expressly authorise and empower my said trustees, &c. at their own discretion, to permit the whole or any part of my personal estate": — the very expression used when he directs part of it to be appropriated to produce 1500*l.* a-year; not the particular stocks and funds so to be appropriated, but the personal estate, — "to remain and continue on such securities as the same may happen to be invested upon at the time of my decease, so long as they shall see fit, without being in any way answerable or responsible for so doing; nevertheless I do hereby fully authorise and empower my said trustees, &c. to sell and absolutely dispose of and convert into money, such part or parts of my personal estate and effects as shall not consist of money or securities for money, and get in, recover, &c." (his Lordship read the whole clause as in page 198). Is it possible to give the trustees a more ample power than he has here given? because he gives them every thing which they could possibly want in the exercise of their discretion. He concludes the whole by saying that they are to have the same power and discretion in the premises, including of course the widow's 1500*l.* a-year, as well as in every other part of the provision which preceded the power given in the will, the same power which he had himself.

Now, taking that clause as applicable to the whole personal estate, giving to the trustees the same power and discretion which he had himself over the prem-

to be sold ; and as ordered that such parts thereof as the Master should be of opinion ought to be sold, should be sold.

ies — including the provision of 1500*l.* — coupled with the two other clauses to which I have before referred, in which he clearly contemplates a possible variation of the fund to be appropriated to provide for the 1500*l.* a-year, that it may not at some future time after his own death be in the same state of investment as it was when it was appropriated ; but it might have been invested in other securities ; you have the power ; you have two clauses manifesting the notion which the testator had in his mind of the possibility at least of that power being exercised over this particular fund, as well as over other parts of the estate. It is matter to me quite clear on this construction, that this power extended over the whole of the personal estate, and that these trustees, therefore, might decide as to the mode of investment, whether they did or not find these funds to be appropriated. Suppose them to be appropriated, it is clear to me that he left that in the discretion of the trustees, and that having left that in the discretion of the trustees, that discretion has devolved on the Court by the trustees having declined the execution of the trusts.

Then comes the question, what is the rule of the Court as applicable to a case of this sort, where the funds are to be appropriated out of the general estate, for answering a particular purpose, for providing first for the widow for life, the principal being afterwards to fall into the residue ? There is but one rule ; the Court will not exercise its discretion as to whether it will invest in one stock or another, or whether one stock is better than another ; there is but one rule, and that is a rule established for the better protection of all parties interested, namely, an investment of the funds in the three per cents, which the testator at all events contemplated as possible, and as to which he gave the trustees a discretion, which, the trustees having declined to exercise, the Court is called upon to exercise.

Being of opinion that this is the clear result of the construction of the will, I consider it unnecessary to advert to many of the observations that were made in argument, showing the absurdity that would arise from a contrary construction. One observation that was made appeared to me to be quite unanswerable. If the construction contended for be the true construction, namely, that the trustees had no power, and the Court had no power, of dealing with any portion of the estate except that fund in the state of investment at the time of the death of the testator, then 10,000*l.* or 20,000*l.*, lying at the bankers', would not be capable of being appropriated as a provision for this purpose. It must be laid out, as it would not be a fund producing income ; it would be a fund to produce income by an act to be done after his death, but it would not be a specific appropriation of any fund in fact producing income at the time of his death ; but I do not advert to those consequences, because, although it appears to me that the Court on a matter of serious doubt might follow each construction to its consequences, and see which is the most reasonable as a means of turning the scale, if there be great doubt and ambiguity on what was the form of expression used. This case, in my mind, is free from doubt, and it is totally impossible to put any other construction on the will consistent with the absolute terms used in the will, but that there was a discretion in the trustees as to the fund which they were to

\* 208     \* *Mr. Bethell* and *Mr. Hetherington* for the appellants. —

It was matter for regret as well as surprise that the question

appropriate, either by purchase or procuring or transferring, in such a way as they might think proper. That discretion has not been exercised by the trustees, and the Court exercises it, therefore, in the usual course of administering property under these circumstances. Then I find it also consistent with the declaration made in the original decree, which stands unappealed from, and therefore binding on all parties. There can be no doubt as to the course which I ought to adopt, and which the Vice-Chancellor did adopt, namely, declaring that the 1500*l.* a-year ought to be provided for by an investment of so much of the personal estate as may be necessary to purchase in three per cents. enough to answer the purpose of producing that income. It was said that there was an expression in the decree which was inconsistent with it, because it had declared "according to the true construction of the will"; in one sense that would be incorrect no doubt, because the will says nothing about three per cents.; in terms, no doubt, it might have been better if it had said, according to the true construction of the will, regard being had to the rules of this Court, or the rule which ought to regulate the conduct of the trustees." I do not think it is necessary to make any alteration in the decree on that point, because in one sense it is correct. The construction of the will bringing the case within the ordinary rule of this Court in administering the trusts, the duty of the Court arises of investing the property in the three per cents. Although the whole does not depend on the construction of the will, it is the construction of the will which leads to the declaration of the Court, namely, that the three per cents. ought to be the fund to produce the 1500*l.* a-year. I do not think it is necessary to make the alteration, which I believe was suggested by myself in the course of the argument, but I shall best perform my duty by affirming the decree.

Now with regard to costs: —

*Mr. Tinney* (for some of the residuary legatees). — On the first rehearing we were willing that the costs should come out of the fund, but on the motion and this second rehearing, we object, because we think that the whole argument might have been brought forward at the original rehearing.

*Mr. Bethell* (for the appellants). — There were new circumstances stated on the motion, which induced the parties to have the matter spoken to again.

THE LORD CHANCELLOR. — Those new circumstances the appellants must have been aware of before; it must have been the appellants' fault, therefore; if there were new circumstances, they should have brought them forward at the right time.

*Mr. Bethell*. — Your Lordship is aware that this original decree, and also the order on further directions, were made when the appellants were out of the jurisdiction of the Court; therefore it came on before your Lordship with the additional fact also of one of the appellants having subsequently proved the will.

THE LORD CHANCELLOR. — What difference can it make in the argument, if those circumstances do not alter the opinion of the Court on the rights of the parties? If the appellants thought the case not in a state to be heard, they should have taken measures to get it postponed; it is a great hardship on the respondents to be brought here again. I think, therefore, I must give the costs as *Mr. Tinney* suggests.

of construction in this case had been so often discussed before different Judges, without their \*perceiving what was \* 209 the testator's intention, so plainly expressed in this will. He gave to his trustees so much of his personal estate as would at his death produce an annual income of 1500*l.* to his widow ; and \*he directed that the same should be selected, appropriated, \* 210 and set apart, as soon as conveniently might be after his death, in their uncontrolled discretion ; and that they should stand possessed of the estate, so \* appropriated and set apart, \* 211 on trust to pay the interest and annual produce thereof to his widow, in the manner mentioned in the will : and after her death or second marriage, it directed that the personal estate so to \*be appropriated and set apart, or the stocks or funds in \* 212 which the same should then be invested, should fall into his residuary personal estate. Could any one in reading that passage entertain a doubt that the trustees \*were bound to \* 213 select and set apart a portion of the testator's personal estate as it existed at his death, sufficient to answer the income of 1500*l.* ? They were not authorised to convert the then existing investments \* of the testator's estate into other securities, so as to \* 214 secure a permanent fixed income of 1500*l.*, because he expressly directed that " in case the yearly interest, dividends, and produce of his personal estate," so to be \*appropriated \* 215 and set apart, or the stocks in which the same should at any time be invested, should from any cause whatever be increased or reduced in amount during the time the same were directed to be paid to his widow, then and in such case she should be entitled to receive such increased or reduced interest, dividends, and annual produce, in lieu and satisfaction of the interests, dividends, and annual produce before directed to be paid to her. That clause clearly manifested the testator's intention that the widow's income should be paid out of the existing and fluctuating investments of his estate. The ordinary power to vary the investments given to the trustees in another part of the will was discretionary, and not to be exercised to the destruction of the interests of other parties.

To convert the foreign stocks at their present value<sup>1</sup> into 50,000*l.* consols to produce a permanent fixed annuity of 1500*l.* to the widow, would be ruinous to the \* residuary \* 216 legatees. *Howe v. Earl of Dartmouth* ;<sup>2</sup> *Cowley v. Hart-*

<sup>1</sup> See Table, ante, p. 202.

<sup>2</sup> 7 Ves. 137.

*stonge*; <sup>1</sup> *Lord v. Godfrey*; <sup>2</sup> *Pickering v. Pickering*; <sup>3</sup> other cases referred to in the judgment were also cited and commented upon.

THE ATTORNEY-GENERAL (*Sir J. Romilly* and *Mr. Tennant* for *Mrs. Prendergast*).

There were two points for consideration, first, the construction of the will; secondly, the rule of Court when trustees declined to exercise the discretion given to them; and of that the counsel for the appellants said nothing. The rule, which is clearly laid down by *Sir W. Grant* in *Cole v. Wade*,<sup>4</sup> is, that if an executor does not exercise a discretionary power given him by a testator, no other person, not even the Court, can exercise it. If a trustee, considering it imperative to exercise the discretion specially given to him, tries to throw it on the Court, the Court will not make a will for a testator, or select the objects of his bounty, but will in such a case divide the estate equally among all of them, as in cases of intestacy. Here it is admitted in the acting executor's answer to the bill that he refused to execute the trust reposed in him, and to select and set apart so much of the testator's personal estate as at his death produced a clear annual income of 1500*l.*; and he submits it as a question of construction and matter of law to the Court, whether there is a manifest intention shown by the will that the executors should make such selection and appropriation. The Court, therefore, has no alternative, but must act upon its own authority, according to the rule before stated: *Penny v.*

*Turner*,<sup>5</sup> and *Fordyce v. Bridges*.<sup>6</sup>

\* 217 \* *Mr. R. Palmer* and *Mr. C. M. Roupell* appeared for the executor, *Mr. H. Prendergast*, but *Lord Brougham* (who sat as Speaker) was of opinion that they ought not to be heard, as their client had no distinct interest.

*Mr. Bethell*, in his reply, said that great irregularities had occurred in the case. The first decree was made in the absence of the parties most interested, and while *Mr. H. Prendergast* was the only defendant, two of his coexecutors being dismissed from the suit. The appellants afterwards became parties, but before they did so effectually the Vice-Chancellor disposed of the whole ques-

<sup>1</sup> 1 Dow, 361.

<sup>2</sup> 4 Maddock, 455.

<sup>3</sup> 4 Mylne & Craig, 289.

<sup>4</sup> 16 Ves. 27.

<sup>5</sup> 2 Phillips, 493.

<sup>6</sup> 2 Phillips, 497.

tion by making the declaration which ought properly, if at all, to be made on further directions. The rule referred to in *Cole v. Wade* had no application here ; this, on the contrary, was one of those cases in which it became the duty of the Court to direct the trustees to give effect to the testator's clearly expressed intention. *Gower v. Mainwaring*,<sup>1</sup> *Hewett v. Hewett*.<sup>2</sup>

It should be remembered that Mr. Harris Prendergast, whilst he continued the sole acting executor, was willing to exercise the authority given by the testator to appropriate a sufficient part of his existing personal estate to answer the annuity to his widow, if the Court was of opinion that the words of the will clearly conferred such power of selection ; and the appellant, Charles George Prendergast, after he had proved the will, was also willing to exercise the power of selection and appropriation. Under such circumstances the Court was neither required, nor at liberty, to direct a conversion of the personal estate into 3l. per cent. bank annuities for the purpose of securing the due payment of the annuity. As Mr. H. Prendergast had \* no separate interest in this \* 218 matter, though he might appear by counsel, he ought not to have presented a printed case ; and therefore he ought not to be allowed costs out of the estate.

*Mr. Tennant* observed upon the two new cases just cited, and distinguished them from the present, on the ground that in them the trustees were dead, and the necessity for the interposition of the Court was therefore imperative.

LORD BROUGHAM. — The question arising in this case is of importance, from accidental circumstances, to the parties ; and it is also important to the law as administered in Courts of Equity. As I entertain no doubt upon it, I shall not delay longer to dispose of the case, and put an end to a somewhat protracted family suit.

First of all, let me state the principle which the concurrent authorities of the case, and the known course of proceedings in our Courts of Equity have established. If a person leaves the disposition of his property after his decease to trustees, and, they declining or neglecting to act, the aid of the Court is required, the Court will not, as a matter of course, exercise the discretion with

<sup>1</sup> 2 Ves. Sen. 87.

<sup>2</sup> 2 Eden, 332.

so much of his foreign stocks or other personal estate, as, when converted into the public funds or invested in real securities in this country, would yield a permanent annuity of 1500*l.*, but that his intention was that none of his securities should be sold for such purpose; but that a sufficient portion of the existing securities at his death should be set apart and appropriated for the purpose, and that the annual amount to be paid to the plaintiff in respect of the annuity should thereafter be dependent on the annual amount of the interest of the securities so appropriated.

The cause was again heard by the Vice-Chancellor, between the appellants and Mrs. Prendergast, in July, 1846, when his Honour pronounced a decree in the same terms as the decree of January, 1846, above stated.

The appellants then appealed to the Lord Chancellor,  
 \* 204 \* who affirmed the decree and dismissed the appeal, and ordered the costs of all parties to be paid out of the testator's residuary estate.

The appellant Charles George Prendergast, one of the executors, availing himself of the power reserved to him, proved the will and codicil, and having, with the other appellants, applied for a rehearing of the appeal before the Lord Chancellor's order was drawn up, his Lordship heard the cause reargued, and finally disposed of it in January, 1847, by again ordering the Vice-Chancellor's decree of July, 1846, to be affirmed, with costs of this rehearing, to be paid by the appellants.<sup>1</sup>

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THE LORD CHANCELLOR. — In permitting this case to be spoken to, and, as it turned out, to be entirely reargued, I yielded to what I supposed to be the strong opinion of eminent counsel, and not from any doubt which occurred to my own mind as to the opinion which I before expressed. I have however so far profited by that reargument that I have again looked through the will. I have considered the reasons on which the decree of Vice-Chancellor Wigram was founded, and I have also now read the pleadings, and I have read what escaped my attention before, the original decree, which I think, if it had been attended to, would have formed a very important ingredient in the consideration of this case, that not being the subject of appeal, the appeal being confined to the decree on further directions. Now the question being under the will, by which, without now adverting to the particular expression I used, the general object was to give the plaintiff 1500*l.* a-year. I will not call it an annuity, because that has been the subject of comment, but he meant undoubtedly that his widow should have 1500*l.* a-year, payable out of some portion of the estate, and that, subject to the

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so much of the Vice-Chancellor's orders of January and

payment of that 1500*l.* a-year, the property was given to the children of the two marriages, and the sum, whatever it might be, to be set apart to answer the 1500*l.* a-year to the widow, was, after her death, to fall into the residue.

That is the general purport of the will: and the question is, whether that 1500*l.* a-year is to be provided for out of the estate in the way in which like provisions of that description usually are, or whether the testator has by his will expressed an intention that it shall be provided for by an appropriation at the time of his death, or immediately on his death, of some portion of such funds as might actually then be in a state of investment and producing income; it must be producing income, otherwise the argument will not hold. No doubt it was quite competent to the testator to make such a provision; it would be a very irrational provision, and it would be one which would be likely to defeat the general object which he had in his will, of producing a life estate for the widow, and afterwards, subject to that life estate, making a provision for the children. Still, if the testator, who was master of his own property, thought proper so to dispose of his property, there can be no doubt as to his competency so to do, and the Court would then be bound to carry it into effect as far as by the rules of the Court it was possible to do. But that, of course, is a matter of construction, and without saying that it requires expressions that leave no doubt, it is a construction which the Court would not very readily accede to, and would only do so if the intention were so essentially clear as that there could be no doubt of miscarriage in adopting that mode of administering the fund. Now it is obvious, and that was conceded in the argument, that if that be so, the funds when set apart would be funds which could not be afterwards altered during the period of the life of the widow, because it would and must proceed entirely on this supposition, that it is a specific appropriation either directly by the testator or through the means which he has directed, and that when that appropriation takes place it is to all intents and purposes a specific appropriation of the income of the funds so set apart, to the wife for her life and afterwards to be divided amongst her children. That would, for the purpose of any discretion which the trustees might have; it would be just the same as if the testator had directed the income to be enjoyed by the widow for life, and afterwards to go amongst the children. If there be in this will a discretionary power to vary the funds, it might afford at least a strong argument of inference of intention that there was no such specific appropriation of particular funds intended, but the object was to provide for the income of the wife without reference to the appropriation of any such funds as might be existing at the time of the testator's death. If that was the construction of the will, and if the trustees having once appropriated the funds, had no discretion afterwards to vary them, but being appropriated, they became the separate property for life of the widow, the Court of course would have no more discretion to vary the fund than the trustees would have, and the trustees having declined to act, and the duty devolving on the Court of doing that which the trustees ought to do, there is no difficulty whatever in the Court exercising that discretion, namely, of inquiring which of the funds existing at the time of the death were funds proper to set apart for the purpose of answering the 1500*l.*



July, 1846, as are above set forth (except the declaration  
 \* 206 that the bequests to such of the testator's daughters, \* living

a-year. That would be merely executing the trust, a trust with a specific direction; it would be a trust without a power; there would be none of that discretion to be exercised in the performance of that duty which has been considered as personal to the individual named by the testator, and therefore not capable of being exercised by the Court or devolved to others. If therefore that is the construction, there would be no difficulty in the Court executing that; it might execute it by directing the Master to inquire which of the funds existing at the time of the death were proper to be set apart for producing the 1500*l.* a-year.

Now before I proceed to make any observations on the will itself, I would state what the decree, not the decree on further directions appealed from, but the decree not appealed from, and which therefore, as the matter stands, must regulate the rights of the parties. By that decree, after directing the usual inquiries and accounts, it was "ordered that the Master should inquire and state to the Court what parts of the testator's estate were then outstanding and invested in any and what foreign stocks or securities, and whether such parts of the testator's estate as were then outstanding and invested in any foreign stocks or securities, or any and what parts thereof, ought to be sold. And it was ordered that such parts thereof as the Master should be of opinion ought to be sold, be sold by the defendant Harris Prendergast." The Court has put a construction on the will, for the Court has declared — and that decree as it stands is binding on all parties — that if the Master shall find that it is not expedient that the property shall remain, — which of course he must find, because he could not find otherwise, although he has not made any report on that part of the case, — if he shall find that it is not expedient that the estate on which the life interest is charged, with remainder to the two families of children, shall remain on the security of these foreign stocks, why then he is without any further direction of the Court to proceed to sell. How is it possible, in the face of that decree, for this Court to say that that is not the construction of the will, the Court having declared that that is the construction of the will? And having dealt with the fund as liable to be disposed of, how can the Court say that the funds are not liable to be disposed of? Whether the investment is good or bad, whether beneficial to the tenant for life or to those in remainder, or whether it be not, it must remain in the state in which the testator left it, after once being appropriated for the life of the widow: if I was of a contrary opinion, on looking at the will, from what I find to be the declaration of the Court on the original decree, it might no doubt create some embarrassment and might give rise to further proceedings: but that which was the declared opinion of the Court, and which now exists as the decree of the Court, is quite consistent with the view I take of this will; and without saying that there are not expressions in the will which give rise to the argument, and which are not so free from difficulty as other expressions that might have been used, on looking at the whole of this will together, I have no doubt whatever, as I expressed before, that there is no such expression of intention as makes it the duty of the Court, or is sufficient to induce the Court, if it had the power of putting that very extraordinary construction upon it, namely, of keeping these foreign securities as the means out of which the 1500*l.* a-year is to be raised.

at his death as should be married, were for their separate use) ; and also against so much of the decree of April, 1845, as referred it to

The testator commences his will by providing for his wife: he says, "I give and bequeath to my trustees, hereinafter named, so much of my personal estate and effects as at the time of my decease shall produce the clear annual income of 1500*l*." Now if it stopped there, no argument could have been raised, because these really would have been ordinary terms. Then we have only to look, if that be the gift, at what is the mode of investment according to the rules of this Court. What are the funds? In what state of investment ought they to be, in order to provide for the tenant for life, where the principal is left to other persons, after the death of the tenant for life? And then he goes on, "and I direct that the same shall be selected, and appropriated and set apart, as soon as conveniently may be after my decease, by my said trustees, and in their uncontrolled discretion."

Now I must observe here, the question is not whether the trustees had by this will a discretion as to whether the property should remain in the foreign funds or not, but it is whether they are directed after once having appropriated the funds to answer the annuity, that they shall remain there; because if it is merely a matter of discretion whether they should be in one fund or another, and the expressions are not certainly confined to the funds as they stood at the time of the death, then it is no more than the discretion which the trustees had, and which they declined to exercise, and which devolves on the Court; and the Court has a rule in regulating its conduct in the exercise of that sort of discretionary trust. "And I direct that my said trustees, and the trustees or trustee for the time being under this will, do and shall stand and be possessed of the personal estate and effects so to be appropriated and set apart, upon trust, to pay the interest, dividends, and annual produce thereof, by equal half-yearly payments, unto my said dear wife during her life, if she shall so long continue my widow, the first of such half-yearly payments to begin and be made at the end of six calendar months next after my decease; and from and after the decease or second marriage of my said wife, I direct that the personal estate and effects which shall be so appropriated," — not speaking of funds or securities specifically, but always using the term "personal estate," — "shall be so appropriated and set apart, or the stocks, funds, and securities upon which the same shall then be laid out and invested, shall sink into and become part of my residuary personal estate." Here then we have an expression which has been observed upon, and which certainly is entitled to considerable weight: he considers, whatever the intention is as to that existing fund or the fund to be procured, he certainly contemplates such an appropriation immediately after his death. He now is referring to what the state of the fund might be at the time of the wife's death, and then he speaks of funds or securities in or upon which the sum which is to secure the 1500*l*. a-year shall then be laid out and invested, he directs that it shall fall into and form part of his residuary personal estate. No doubt he might have used the expression without referring to the thing by which the state of investment might be varied at a period immediately following his own death, and the death of the wife. Still, it is much more consistent with the supposition that he intended the trustees should have a dis-

or that any fund should be excluded, or that any other mode of dealing with the property should be pursued, or any other mode excluded ; then of course the case would have fallen within the scope of those principles, which I stated in the outset, and would have come within the application of the cases, to which in order to give an illustration of the general principles, I have referred. But I can descry no such intention in this will, either expressed or implied ; on the contrary, the testator clearly contemplated a possible, perhaps a probable, conversion, and in that he did not fetter the trustees, nor is the Court bound.

I advise your Lordships, therefore, that the judgment appealed from should be affirmed, and Mr. Harris Prendergast, who ought not to have printed any case, though he might attend by counsel, is not entitled to have out of the residuary estate any costs of the unnecessary part of his case ; his other costs he is entitled to have with the other parties.

*The Attorney-General.* — I would submit to your Lordships that the appeal ought to be dismissed with costs, not to come out of the estate.

LORD BROUGHAM. — I thought all the costs had come out of the estate.

*The Attorney-General.* — Hitherto they have, but, considering that there have been two decisions against the appellants, I should submit to your Lordships that they ought to pay their own costs.

\* 225     \* LORD BROUGHAM. — You mean to contend that they ought to have been satisfied with the judgment of the Court below.

*The Attorney-General.* — Yes, I should have suggested that undoubtedly.

LORD BROUGHAM. — I think it is rather a hard case.

*The Attorney-General.* — I will leave it to your Lordship's discretion.

*Ordered that the appeal be dismissed, and the decree and orders be affirmed, and the costs of all the parties be paid out of the residuary personal estate of the testator, except Mr. Harris Prendergast's costs of his printed case and appendix.*

to be sold ; and as ordered that such parts thereof as the Master should be of opinion ought to be sold, should be sold.

ises — including the provision of 1500*l.* — coupled with the two other clauses to which I have before referred, in which he clearly contemplates a possible variation of the fund to be appropriated to provide for the 1500*l.* a-year, that it may not at some future time after his own death be in the same state of investment as it was when it was appropriated ; but it might have been invested in other securities ; you have the power ; you have two clauses manifesting the notion which the testator had in his mind of the possibility at least of that power being exercised over this particular fund, as well as over other parts of the estate. It is matter to me quite clear on this construction, that this power extended over the whole of the personal estate, and that these trustees, therefore, might decide as to the mode of investment, whether they did or not find these funds to be appropriated. Suppose them to be appropriated, it is clear to me that he left that in the discretion of the trustees, and that having left that in the discretion of the trustees, that discretion has devolved on the Court by the trustees having declined the execution of the trusts.

Then comes the question, what is the rule of the Court as applicable to a case of this sort, where the funds are to be appropriated out of the general estate, for answering a particular purpose, for providing first for the widow for life, the principal being afterwards to fall into the residue ? There is but one rule ; the Court will not exercise its discretion as to whether it will invest in one stock or another, or whether one stock is better than another ; there is but one rule, and that is a rule established for the better protection of all parties interested, namely, an investment of the funds in the three per cents, which the testator at all events contemplated as possible, and as to which he gave the trustees a discretion, which, the trustees having declined to exercise, the Court is called upon to exercise.

Being of opinion that this is the clear result of the construction of the will, I consider it unnecessary to advert to many of the observations that were made in argument, showing the absurdity that would arise from a contrary construction. One observation that was made appeared to me to be quite unanswerable. If the construction contended for be the true construction, namely, that the trustees had no power, and the Court had no power, of dealing with any portion of the estate except that fund in the state of investment at the time of the death of the testator, then 10,000*l.* or 20,000*l.*, lying at the bankers', would not be capable of being appropriated as a provision for this purpose. It must be laid out, as it would not be a fund producing income ; it would be a fund to produce income by an act to be done after his death, but it would not be a specific appropriation of any fund in fact producing income at the time of his death ; but I do not advert to those consequences, because, although it appears to me that the Court on a matter of serious doubt might follow each construction to its consequences, and see which is the most reasonable as a means of turning the scale, if there be great doubt and ambiguity on what was the form of expression used. This case, in my mind, is free from doubt, and it is totally impossible to put any other construction on the will consistent with the absolute terms used in the will, but that there was a discretion in the trustees as to the fund which they were to

hold the aforesaid office of teller of the said Edinburgh and Leith Bank, in consequence of the said election, or by annual re-election, or otherwise, I shall have no business of any kind, nor be connected in any shape with any trade, manufacture, or mercantile copartnery, in any manner or way whatsoever, and that I shall carefully and diligently attend to the business of the said Edinburgh and Leith Bank, and faithfully discharge the duties of teller aforesaid, to the best of my skill and ability; and shall well, fully, and truly account to the manager or to the directors of the said Edinburgh and Leith Bank for the time, for behoof of said Bank, for all sums of money, whether in specie or bank notes, bills, discounts, debentures, or other securities with which I shall be entrusted from time to time, or which shall come in any way

\* 228 into my \* hands in the execution of the trust committed to me; and shall pay and deliver to the said manager or directors for the time, all sums of money belonging to the said bank in my custody, whenever required so to do; and whatever loss, damage, skaith, or expense the said bank shall happen to sustain or incur, by or through me, the said David Baird, teller aforesaid, I, the said David Baird, as principal, and we, the said William Macdonald, William Ballantyne, and Archibald Torrance, as cautioners, sureties, and full debtors for and with the said David Baird, under the declaration after mentioned, do hereby bind and oblige ourselves, conjunctively and severally, and our respective foresaids to make good, refund, and pay to the said Edinburgh and Leith Bank, or to the manager thereof for the time, for the use of the said bank, and that immediately upon their sustaining or incurring the said loss, damage, skaith, or expense, with a fifth part more of penalty over and above the payment, and the legal interest of all such loss, damage, skaith, or expense, from the time the same shall be incurred till payment thereof, declaring always as it

of Scotland," tit. "Discussion": "Where a cautioner is bound simply as cautioner, and not conjunctly and severally with the principal debtor, he may insist that, before the creditor uses diligence against him, the principal debtor shall be discussed; that is, not merely that the debt shall be demanded, but that the creditor shall carry personal diligence against the principal debtor, the length of a registered denunciation on letters of horning, — that he shall proceed against his moveables by pounding, or by arrestment and forthcoming, and against his heritage by adjudication and sale." Here the "benefit of discussion" was expressly waived by these respondents in the deed of security. See *Owen v. Homan*, 4 House of Lords Cases, 1009, note.

is hereby specially provided and declared, that we, the said cautioners, are and shall only be liable, by virtue of this present bond of cautionary, in the sum of 1000*l.* sterling, to which our security is restricted, and to be no further extended." Some little time after this bond had been given, a change was made in Baird's situation, and he was appointed manager of a branch bank at Dalkeith. The change thus made was duly communicated to the sureties, and in May, 1839, a memorandum to the following effect was indorsed on the original security : —

" We, David Baird, W. Macdonald, W. Ballantyne, and Archibald Torrance, all within designed, considering \* that \* 229 since the execution of the within written bond, the said D. Baird had been appointed agent at Dalkeith, for the within mentioned Edinburgh and Leith Bank, on condition of our continuing our cautionary obligation for him, to the extent and in the manner within specified, do hereby consent to the said alteration in the situation held by the said D. Baird, and declare that, so long as he shall continue agent as aforesaid, the whole obligations and stipulations of the within bond shall be applicable to, and have full force, strength, and effect, and be equally binding on us and our within written, for and in respect of the said D. Baird, as agent aforesaid, and that in the same manner as if the whole obligations within written were here repeated, any law or practice to the contrary notwithstanding."

In April, 1840, another change took place in Baird's situation ; his salary was raised, but his liabilities were increased, and he agreed, on receiving a proportionate increase of pay, to undertake the liability of one fourth of the losses on the discounts at the bank. This change was not communicated to his sureties.

On the 14th of May, 1840, Kerr, accountant to the bank, wrote to him a letter on the subject, in the course of which he referred to the previous extension of the bond on the first alteration in Baird's appointment, and with respect to the second, said : " In consequence of the alteration in the terms on which you hold your appointment, you now being liable for a certain part of the loss arising from discounts, it will be necessary that you should execute a new bond. I have not intimated it to your cautioners, as it will be better for you to do so yourself, but I shall be glad that you should take an early opportunity of advertising me whether I shall re-extend your bond by the same parties."

\* 230      \* On the 15th of May, Baird wrote an answer, denying the necessity for altering the bond, and said, "the Directors are pressing the thing too hard ; and if I was asked to become their security on the same terms, I certainly would decline ; and, on the same principle, I regret to say that I could not go forward to ask my present securities on these terms ; but as far as I am personally concerned, I shall have no objection to sign any letter of guarantie or bond you may wish to that effect, by way of holding *me liable* for a fourth of the loss, and would thank you to impress on the Directors the unpleasant step they are wishing to enforce upon me." This letter was laid before the Directors, who entered it on their minutes, and added that they declared themselves satisfied therewith. During the years 1840 and 1841, Baird allowed a customer of the bank to overdraw his account, being the amount of his deposits, and though the customer had given a bond to cover such advances, yet Baird well knew that that bond, which Baird had in his own possession, though executed by the customer, was not executed by any sureties on his behalf. This sort of dealing seemed to have gone on for some time, and the customer incurred a *debt* of one thousand pounds, to recover which the appellant as the trustee of the bank, in the year 1844, brought an action against the respondents, who were Baird's sureties. The defence was, first, that the bond executed by them was not intended to cover such a liability as this ; secondly, that the bank and Baird having altered the contract so as to increase the liability of Baird, had thereby discharged his sureties, without whose knowledge or consent such alteration had been made ; and, thirdly, that the conduct of Baird with regard to the overdrawing in respect of which this action \* was brought, was known to the directors of the bank, or but for their negligence might have been known to them, so that they must be taken to have acquiesced in such conduct, and not to be entitled to maintain this action. The Lord Ordinary (Lord Wood) reported the case to the Inner House, where, upon the defence set up by the second plea, judgment was given in favour of the sureties. This was an appeal against that judgment.

*Mr. Turner and Mr. Anderson* for the appellant : —

The rule that a bond or a bill cannot be altered, without releasing the parties not originally liable upon it, is not without excep-

tion. In the case of a bill, the materiality of the alteration is considered with relation to the acts and liabilities of other parties, — a fact which shows that the rule against alterations is one which is not inflexible, but which does admit of exceptions. The same observation may be applied to bonds. In *Eyre v. Everett*,<sup>1</sup> Lord Chancellor Eldon held that the liability of a surety in a bond is not discharged by the delay of the creditor in suing for the debt, nor by the circumstance of the principal debtor afterwards executing to the creditor another bond for a larger sum. *Parker v. Wise*<sup>2</sup> is to the same effect. Nor is this the law of England alone, although in cases of this sort there may be more precedents here than in Scotland; but the case of *Ellice v. Finlaison*<sup>3</sup> exactly warrants the same line of reasoning, and shows that the Scotch Courts, though holding a similar rule as to alterations of a bond, also admit similar exceptions to it. There, as in this case, the parties who were principals \* some time after the guar- \* 232 antie had been executed deviated from the mode in which they had carried on their business when the guarantie was executed, but that deviation was held insufficient to discharge the surety.

There was no substantive alteration made in the situation of Baird, none at least which will release the sureties from their liability, for they assented to his performing all the duties of bank agent, of which discounting bills was necessarily one, and consequently they guaranteed the bank against loss from his conduct in that branch of the business. An employment of funds raised on a security different from that which the surety expected will not relieve him from the effect of his bond; *Hamilton v. Watson*.<sup>4</sup> There the obligation was given to a banker, for a cash credit to one of the banker's customers, and that credit was used immediately afterwards to pay off an old debt due to the banker. The surety had expected that the cash credit was to enable the customer to get fresh funds, not to discharge an old debt; but this House, affirming the judgment of the Court below, held that the fact of the money being employed in a manner different from what the surety had expected, did not release him from his liability. And in the earlier case of *Mactaggart v. Watson*,<sup>5</sup> this House held

<sup>1</sup> 2 Russell, 381.<sup>4</sup> 12 Clark & Fennelly, 109.<sup>2</sup> 6 Maule & Selwyn, 239.<sup>3</sup> 3 Clark & Fennelly, 525.<sup>5</sup> 10 Shaw & Dunlop, 345.



that the negligence of the persons to whom the bond was given, by which negligence the principal obligor had been enabled to incur the debt for which his surety was sued, did not discharge his surety. That case completely answers one of the defences set up here.

But further, the default of Baird is one in respect of which \* 233 the surety is bound under the express terms of his \* original agreement. The loss does not arise from a defect of judgment in erroneously discounting, but from improperly allowing a customer to overdraw his account. That is a matter of conduct for which these respondents had distinctly undertaken to be answerable. The original agreement, therefore, so far as the facts of this case are concerned, is the one which has been acted on, and the liability arises in respect of a breach of the duty thereby undertaken. So that, supposing, which is however denied by the appellant, that the arrangement of May, 1840, was a different and a new agreement, still the former agreement remains in force, so far at least as to make the appellants liable for a loss occasioned by something against which that agreement by its very terms professes to guard.

*Mr. Bethell* and *Mr. Baillie* for the respondent : —

The principle that an alteration in a bond does vitiate the bond is clearly established, and the cases cited on the other side do not affect that principle. Lord Loughborough, a lawyer conversant with the laws of both England and Scotland, stated the principle in a very clear and undoubting manner in *Rees v. Berrington*,<sup>1</sup> and the doctrine there laid down has never since been impeached. There the obligee in a bond with a surety, without communication with the surety, took notes from the principal, and gave further time, and it was held that the surety was thereby discharged. Lord Loughborough said : <sup>2</sup> “ Where a man is a surety at law for the debt of another, payable at a given day, if the obligee defeats the condition of the bond, he discharges the security.

\* 234 When they are bound jointly \* and severally, the surety cannot aver, by pleading that he is bound as surety ; but if he could establish that at law, the principle of law is, that he has an interest in the condition ; and if the period is extended, that totally defeats the condition, and the consequence is, the surety is

<sup>1</sup> 2 Ves. Jun. 540.

<sup>2</sup> 2 Ves. Jun. at p. 542.

released from his engagement. Suppose a bond payable in six months, with a surety, he does not become bound to answer the engagement at twelve months, where it was to be at six. The principle is a legal principle. In this Court they all appear principals; but establish the fact that he is a surety; he is surety to a definite, not an indefinite engagement." His Lordship there referred to and approved of the decision in *Nisbet v. Smith*,<sup>1</sup> where the creditor sued the principal, but, without the knowledge of the surety, took a warrant of attorney from him, and gave him time, and was therefore held thereby to have discharged the surety. Here the case is stronger, for the alteration has been made in the stipulation in the deed itself. That alteration is one of a substantive kind: it constituted the principal obligor an agent to the banking house on a *del credere* commission, a position in which his honesty and his attention to business, and his regularity in rendering his accounts, might not save him from bankruptcy. Now it was only for these qualities that the sureties here became responsible. They did not assent to his undertaking liability on discounts, for merely discounting according to previously received orders from his employers, which was all he was before required to do, would not be to incur any such liability, and when, therefore, by express stipulation, he undertook that liability, the nature of his contract was changed. Indeed the very words of the bond here exclude the right to make such a change, for they say that he shall not \* "be security for any person what- \* 235 ever." Now to be responsible for persons to whom discounts are granted, is to make him security for them, and is, so far, to do that which the very terms of the original bond forbid.

The cases decided in this House, and quoted on the other side, do not affect the present. Mere negligence on the part of the obligees, of course, would not release the obligors, and that was the case of *Mactaggart v. Watson*, nor would the particular employment of the money obtained on a cash credit, and that is all which *Hamilton v. Watson* establishes, have that effect. But there are other cases decided in this House which are in point. *Railton v. Mathews*,<sup>2</sup> and *Squire v. Whitton*,<sup>3</sup> do lay down rules which bear upon the present case. In the former, mere non-communication of the circumstances with which the surety was entitled to be

<sup>1</sup> 2 Brown C. C. 579.

<sup>2</sup> 1 House of Lords Cases, 333.

<sup>3</sup> 10 Clark & Finnelly, 934.

acquainted, though neither wilful nor fraudulent, was held to release him; and in the latter, that rule was adopted, and applied with even greater strictness. The cases of *Bamford v. Nes*,<sup>1</sup> and *Clarke v. Green*,<sup>2</sup> show how small a variation in a bond or guarantee will discharge a surety.

*Mr. Turner* in reply. — It may be admitted that the obligations of a surety cannot be extended without his consent, but the question here is, whether any thing of that sort has been done. The obligations of the surety have not been extended. *Baird* was, by his original appointment, bound to attend to the discounts. His undertaking to be responsible for a part of the losses upon them, was like consenting to be fined if he did not properly discharge his duty, — a consent that would only make him the

\* 236 \* more careful against incurring losses for which his sureties were to be answerable. The loss however did not arise from any discounting business, but from *Baird* allowing a particular customer to overdraw his account. Now that was a piece of misconduct on the part of *Baird*, and for his misconduct or negligence in the performance of his duties, the sureties expressly undertook to become liable. In truth, this is a suit against them in respect of that very matter, against which by their original bond, and the subsequent indorsement on it, they had agreed to protect the bank.

1850. August 9.

**LORD BROUGHAM.** — My Lords, this case was heard last year by the late Lord Chancellor and myself. Three parties became, what are called in Scotland, “cautioners” for the faithful discharge of the duties of his office by a bank agent, who was moreover bound in a bond “to have no other business of any kind, nor to be connected in any shape with any trade, manufacture, or mercantile copartnery, nor to be agent for any individual or copartnery, nor security for any individual or copartnery, in any manner or way whatsoever.” Those were the terms of the cautionary obligation.

The bank thereafter entered into an agreement with the agent, whereby he became liable for one fourth of the losses arising from discounts, and his salary was in consequence increased; but the cautioners were not informed of this agreement. The Court below held that in respect of the alteration thus made by the bank in his

<sup>1</sup> 3 Exch. Rep. 380.

<sup>2</sup> 3 Exch. Rep. 619.

position, the cautioners were not liable for losses caused by the misconduct of the agent, and this, notwithstanding that the loss sought to be recovered did not arise in consequence of any transaction under the new agreement.

\* Lord Cottenham (with whom I entirely agree) has sent \* 237 me this note of his opinion, which I will read to your Lordships as part of the statement of my own. My noble and learned friend, who is now absent, thus sets forth his own reasons for the judgment which, agreeing as I do with him, I am about to recommend your Lordships to pronounce:—

“The Court of Session decided this case in favour of the defender, upon the grounds raised by the second plea in law, ‘that the bank, without the consent or knowledge of the defenders, the cautioners, altered the contract between them and the agent, so as to increase the liability of the latter. Concurring, as I do, with the opinion of the Judges of the Court of Session, it is unnecessary for me to observe, upon the other grounds discussed by the Lord Ordinary. By the bond entered into by Baird the agent, and the respondents his cautioners, with the Edinburgh and Leith Bank, for the due performance by Baird of the duties of the office of teller of the bank, it was stipulated that he should have ‘no other business of any kind, nor be connected, in any shape, with any trade, manufacture, or mercantile copartnery, nor be agent for any individual or copartnery, nor be security for any individual or copartnery in any manner or way whatsoever.’

Upon Baird’s appointment by the directors of the bank to be their agent for the branch at Dalkeith, a supplementary obligation was entered into, by which the cautioners conceded that their former obligation, and all its provisions, should be applicable to Baird’s agency at Dalkeith. Whatever may be the usual duties and liabilities of an agent of a branch bank as to the discount of bills, it is clear that as between Baird and his principals it was not considered that he was to have any thing to do with that business as agent of the Dalkeith \* branch, so as to impose \* 238 any liability upon him, because a new arrangement was afterwards entered into between him and his principals, by which it was agreed that his salary should be raised to 130*l.* per annum, he becoming responsible for one fourth of the losses sustained by his discounts. This alteration in the contract between the principals and the agent is the ground relied upon by the second plea

in law, upon which the judgment is founded ; and so sensible were the directors of the bank that this affected the liability of the cautioners, that we find the agent writing to Baird thus : [His Lordship stated the letter ; see ante, p. 229.]

“ Baird objected to apply to his cautioners, and nothing more was done, they remaining in ignorance of, and certainly not being parties to, this alteration in the contract between Baird and his employers. The loss now sought to be recovered against the respondents as cautioners does not appear to have arisen from the discounting business, but to consist of a balance due from a customer of the branch bank, who was permitted to overdraw his account to an unusual and unreasonable extent, without security. But if the arrangement as to the discounts altered the subsisting contract between the bank directors and their agent, so as to increase the liability of the latter, his securities may be discharged for all purposes. Such is the law of this country, and the law of Scotland is the same. The rule as extracted from the English authorities, *Evans v. Whyte*,<sup>1</sup> *Eyre v. Bartrop*,<sup>2</sup> *Archer v. Hale*,<sup>3</sup>

*Whitcher v. Hall*,<sup>4</sup> is, that any variance in the agreement to  
\* 239 which the surety has subscribed, \* which is made without the surety’s knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety. As to Scotland, in Bell’s Principles,<sup>5</sup> the rule is laid down that ‘the cautioner is freed by any essential change, consented to by the creditor on the principal obligation or transaction, without the knowledge or assent of the cautioner,’ which is supported by the authorities there referred to.

“ The only question, therefore, is, was the arrangement as to discounts an essential change in the principal obligation ? This the parties have themselves decided, for in stipulating that Baird should remain free from any engagement or suretyship for any other person, they admitted that his doing so would be injurious to the other parties to the contract, and it would not be less so because the engagement or suretyship was for the benefit of the

<sup>1</sup> 5 Bingham, 485 ; Moody & Malkin, 468.

<sup>2</sup> 8 Maddock, 221.

<sup>3</sup> 4 Bingham, 464.

<sup>4</sup> 5 Barnewall & Cresswell, 269 ; 8 Dowling & Ryland, 22.

<sup>5</sup> Page 71.

bank, being, as it was, to the prejudice of the cautioners. This stipulation precludes the pursuers from contending with success that the arrangement as to discount was immaterial to their interests in the suretyship, or was collateral to and independent of it, and these are the only grounds upon which they rely.

"I am, for these reasons, of opinion that the interlocutor appealed from was right, and that the appeal ought to be dismissed, with costs."

My Lords, agreeing entirely with the view thus taken of the case by my noble and learned friend, I move your Lordships that the interlocutor appealed from be affirmed, with costs.

*Interlocutor affirmed, with costs.*

THE ATTORNEY-GENERAL, *Appellant*.

RICHARD HENRY COX and others, *Respondents*.

CHRISTOPHER PEARCE and JOHN GEO. NUTTING, *Appellants*.

THE ATTORNEY-GENERAL, *Respondent*.

*Mortgage. Covenants. Specialty Creditors. Vendor. Application of Purchase Money. Costs.*

A mortgagor represented to an intending purchaser that the estate was only liable to a mortgage for 20,000*l.* to G. and Co., an additional sum of 10,000*l.* being secured on the mortgagor's personal property. The whole sum had in fact been originally secured on the land, and G. and Co. denied that they had ever done any thing to part from their security on the land. After the death of the mortgagor, G. and Co. filed a bill of foreclosure, and obtained from the purchaser the whole 30,000*l.*

*Held*, that as between the purchaser and the executors of the mortgagor, the representations made by the mortgagor to the intending purchaser were equivalent to a contract with him, and the personal property of the mortgagor was liable to the extent of the 10,000*l.*

C. and Co. were legal mortgagees and specialty creditors for a sum of 30,000*l.* on Y.'s estate. Certain official persons acting as trustees for the Crown paid off this debt, and received an assignment of the mortgage, and of a covenant therein contained with liberty to sue upon it, in trust for the Crown.

*Held*, that the Crown was legal mortgagee and specialty creditor for the 30,000*l.* originally due to C. and Co.

It is not a rule of Equity that, upon the purchase of property, subject to encum-

brances, for its full value, the vendor is bound to apply the purchase money in payment of the encumbrances according to their priorities. Such a duty can only be the result of express agreement, or of a contract to be implied from the circumstances of the case.

Where a lease, containing a personal covenant for the payment of rent is surrendered, the personal covenant is independent of the estate in the property, and, as to rent previously due, is not affected by the surrender, but the lessor remains a specialty creditor for the rent which accrued due before the surrender.<sup>1</sup>

This House, in overruling exceptions which had been allowed in the Court below, but which ought to have been overruled there, gave the costs in the Court below.

THESE were appeals against an order of the Vice-Chancellor of England, pronounced on the 10th of \* April, 1845,<sup>2</sup> in a suit respecting the estate of the late Duke of York.

On the 26th of October, 1810, a lease, containing the usual covenants for payment of rent, &c. was made by his late Majesty George III. to the Duke of York, by which certain grounds, then forming part of the stable yard, and subsequently made the site of York House, were demised for a long term of years. The Duke of York was at that time under liabilities to Messrs. Greenwood, Cox, and Hammersley, for advances to a large amount. On the 14th of November, 1811, the Duke executed an assignment of this lease to them by way of mortgage, the deed of mortgage containing, in addition to the usual clauses, his personal covenants to repay such advances, with interest at 5*l.* per cent. On the 4th of May, the Crown granted the lease of a piece of ground immediately adjoining the part previously leased, and this newly demised ground was, on the 3d of July, 1824, assigned by way of mortgage to Greenwood and Cox, for further securing the sums of money then due, and interest, subject to the same equity of redemption, and to the same covenants as were contained in the previous mortgage deed. On the 17th of March, 1826, a fresh deed was entered into between the Duke of York of the first part, Messrs. Greenwood and Co. of the second part, the Commissioners of Woods and Forests of the third part, and the King (George IV.) of the fourth part, which recited that under the previous deeds there was then due to Messrs. Greenwood a sum considerably exceeding the sum of 30,000*l.*, with interest; that the Duke had taken down the old

<sup>1</sup> See *Grey v. Friar*, 4 House of Lords Cases, 565, 577.    <sup>2</sup> 14 Simons. 505.

buildings on the demised grounds, and had begun to build a capital messuage thereon, but being desirous, for certain reasons therein set forth, to surrender \* the leases already mentioned, and to obtain a new lease, and Messrs. Greenwood having consented to join in the surrender, the old leases were surrendered accordingly. It was by this deed of surrender further agreed between Messrs. Greenwood and the Duke, that the Duke might mortgage the new lease for all or any part of the term thereof, to any persons, for securing the sum of 30,000*l.*, with interest, and that subject to such mortgage, the intended lease and the premises therein comprised, should be assigned to Messrs. Greenwood by way of mortgage, for the sum of 30,000*l.*, part of the money remaining due to them, with interest at 5*l.* per cent. And it was further agreed that this arrangement should not prejudice any other security which Messrs. Greenwood might have for the whole of their debt, or any part thereof. The Duke was at this time possessed of several chests of plate, which were deposited at Messrs. Coutts', but on which Messrs. Greenwood claimed a lien. The new lease bore date the day after this surrender, and on the 17th of May following, the Duke of York, exercising the liberty reserved to him in that deed, mortgaged the new lease to Coutts and Co., for a sum of 30,000*l.* then advanced by them, but he never executed any specific mortgage of this new lease to Messrs. Greenwood and Co.

The Duke, being pressed for money to go on with the building of his house, applied to Messrs. Greenwood for a further loan of 10,000*l.*, which, however, they declined to advance, but they consented that if the Duke could prevail on Messrs. Coutts to advance the 10,000*l.*, that sum might be added to the mortgage already granted to Messrs. Coutts, and might take priority of their own security on the house. Messrs. Coutts did not advance the further sum, and the Duke then had a personal \* conference \* 243 with Mr. Greenwood, the result of which he afterwards appeared to have misunderstood ; for, not obtaining the assistance he required either from Messrs. Coutts or Messrs. Greenwood, he applied to the Crown, as owner of the land, to advance upon the security of the house all the sums necessary to complete it, as an inducement to do which he represented that the mortgage to Coutts and Co. was to be treated as the only encumbrance affecting the house prior to the advances to be made by the Crown.



In June, 1826, the Commissioners of the Treasury, to whom this application had been made, addressed certain questions in writing to the Duke, which were also answered in writing by him. Amongst others the third question was, "What is the amount of the debt secured upon the house?" And the material parts of the answer were as follows: "At present there is no further mortgage upon the house than the 30,000*l.* lent in February by Messrs. Coutts and Co., and the 10,000*l.* [the sum the Duke then wanted to raise], which are to be paid next Friday, and which of course must be added to the debt. \* \* \* Messrs. Greenwood and Co. have a running mortgage upon the house, but which can be of no value to them unless the house is completely rebuilt, and the property is placed in a condition to bear it, and they have, in the mean time, very handsomely agreed to allow their claim to be superseded till an arrangement can be made, which shall give due value to the property, and if any arrangement can now be made respecting this property, the Duke of York has no doubt that he will be able to find the means of effecting another security for Messrs. Greenwood and Co., or of paying off the sum borrowed from them." To this last answer there was a marginal note, in the following words: "How much more eligible such a security might

\* 244 \* be to a person or persons standing, as the Crown does, in the situation of landlord, towards the lessee, has not been taken into the above calculation, though it is presumed that it ought to have no little weight."

In consequence of the explanation thus furnished, the Commissioners of the Treasury consented to advance the sum of 20,000*l.* in the first instance on such security, and accordingly advanced, on the 30th June, 1826, the sum of 10,000*l.*, and on the 10th of July, a further sum of 10,000*l.* On this latter day, the Duke signed a memorandum to this effect:—

"Whereas the Lords of the Treasury advanced to me, on the 30th ultimo, the sum of 10,000*l.*, for which I gave them my receipt, and an engagement to execute a security. And whereas they have this day advanced the further sum of 10,000*l.*, now I do hereby engage upon request, and at my expense, to execute a security for those two sums on my house and premises in the Stable-yard, payable at the end of six months from the date hereof, with interest at five per cent. And I do further agree that, in case their Lordships shall pay off the existing mortgage for

30,000*l.*, and advance me the further sums necessary for the completion of my house, and on security thereof, that I will enter into an engagement (in case I should be disposed to part with the same before the money to be secured thereon shall be paid off, but not otherwise), to give them the option of purchasing at a valuation of two indifferent persons, one to be chosen by each party; and also, in case I shall not pay the money so to be secured in my lifetime, then that my representatives shall offer my said house and premises to the Lords Commissioners for sale upon the same terms."

On the 12th of July, the Duke wrote a letter to Lord \* Liverpool, then First Lord of the Treasury, stating that \* 245 the expense of the building had exceeded his expectations, and that it had become necessary for him to raise money to complete it, and adding, "Before, however, I take any steps for this purpose, I consider it incumbent on me to inform your Lordship of my intentions, in order that, if the Lords of the Treasury should think it desirable that any reversionary interest, by way of mortgage or otherwise, on this ground and property, should rather be in the Crown than possessed by any individual, they may take such steps as may appear to them expedient for securing that object." While these negotiations were going on with the Treasury, the Duke learned that Messrs. Greenwood, becoming acquainted with what had taken place, complained of it, and insisted that they had not in any way waived their mortgage on the house, or accepted any thing in the way of a substituted security. He thereupon wrote to them, on the 19th of July, a letter to the following effect:—

"Dear Greenwood,—When we parted on Friday, I hoped that you had consented, after the full communication which we had together, to accept another security for the advances of your house upon my fifty-six chests of plate now at Messrs. Coutts's, and that there would be no difficulty in exonerating the house, in order to enable me more satisfactorily to treat with the Treasury, whose express agreement with me is, that they shall be the sole mortgagees of the house in the Stable-yard, and upon which they have so far acted as to advance already a certain sum on account of Mr. Wyatt. I saw Mr. Parkinson on Saturday, and desired him to see your solicitor, Mr. Fynmore, on the subject, which he has done, and he has sent me a copy of a letter from Mr. Fynmore,

\* 246 which I enclose, and which has not only surprised \* but distressed me very much, as I cannot help feeling that there must be some misunderstanding on the subject, considering, as I had done, that the matter was understood between you and me, namely, that if the Crown consented to assist me, you would be no bar to any arrangement I might make with the Treasury. I hope I am right in the conclusion I came to, and that you will give immediate directions to Mr. Fynmore to carry it into effect. I have no doubt that the plate is of sufficient value to cover you, and I do trust for your acquiescence in this matter, which is so very important to me. Ever," &c.

This letter was answered by one written on the 21st of July by Mr. Cox to Sir Benjamin Stephenson, of which the following are the material parts: "On my return to the office this morning, I received, with the most unfeigned regret, the substance of a communication from His Royal Highness to Mr. Greenwood, from which it would appear that some misapprehension has existed between His Royal Highness and him, relative to a wish to remove from off York House the security we claim upon it. How that has arisen, I cannot say. All I know is, that the first I heard of it was in consequence of an interview between Mr. Parkinson and Mr. Fynmore. That such a communication took me by surprise, is most certain; having heard nothing since a wish was expressed through Mr. Humphries, that if a further 10,000*l.* could be obtained through the same channel that the 30,000*l.* was, we would admit of that being added to the thirty, and to take precedence of ours. To this it was signified there would be no objection, supposing the plate to be a security for the balance due to us, *ultra the 30,000*l.* mortgage on the house.*" He then went on to show

\* 247 that his house had more freely \* than any other assisted the Duke, and observed: "In a business like ours, subject to such fluctuations and casualties, it is absolutely necessary to keep our funds as much as possible within our reach; and where we cannot do that, to have an available security to resort to in times of momentary pressure. Such our original security on York House afforded, and such, though not equally satisfactory, the new one engaged to be granted would still have presented; but which would not be equally the case with the plate, though placed in our actual possession, even if not required to cover the balance of the existing debt. Under these circumstances, I am sure you will feel no as-

tonishment at any reluctance we may express to relinquish a security so necessary to our business, and, indeed, without which we might have found it at times difficult to have afforded accommodation to the extent we have."

The Duke of York, in a letter to Mr. Greenwood, dated the 24th of July, acknowledged this letter of Mr. Cox, and said that what was complained of arose entirely from misconception. He referred to the memorandum sent to the Lords of the Treasury on the 27th of June, as truly showing how he understood the business, and narrated the circumstances which had already occurred up to the time of his borrowing, with the consent of Greenwood and Co., the sum of 80,000*l.* from Messrs. Coutts. He then proceeded thus :—

"Since that time, the Treasury have expressed their readiness to make the further advances on the house, on condition that they should be the sole mortgagees, and have, indeed, paid part of the sum ; and it is obvious that, as proprietor of the soil, the Crown would find its account in making a larger advance than any individual not similarly circumstanced.

\* "This arrangement, however, would be effectually de- \* 248 feated by the continuance of your mortgage, as the value of the house must depend upon its being completed and habitable, and the progress of the work would be interrupted by the absence of the aid from Government ; it stands to reason that the value of your mortgage would be in the same manner deteriorated, as the security would be comparatively null. It appears, therefore, to me, that the propriety or impropriety of your transferring your mortgage from the house to the plate is not the question for your consideration, but that the question is, whether you shall enable me to grant you an adequate security. My object, for which I am certain you will give me credit, is, to give you the best security I can offer, and such is at present, under all the circumstances I have stated, the plate ; but your holding this will not preclude me from giving you, either in substitution or in addition, any security which may be practicable. In fact, I offer you positive effects as a security for the sum advanced, in the room of security of which the value to any one must be very questionable so long as the completion of the building is interrupted by the want of that money which I have no chance of obtaining unless the property be relieved from your mortgage."

On the 26th of July, 1826, Greenwood and Co. caused the following memorandum to be delivered to Mr. Parkinson, as the solicitor of the Duke of York: —

“It is much to be regretted that the substance of the paper, dated the 27th June, 1826, was not communicated to Messrs. Greenwood, Cox, and Co.; it would have prevented the misunderstanding that appears to have occurred. That Messrs. Greenwood, Cox, and Co. allowed their security on York House \* 249 to be superseded, \* as far as Messrs. Coutts were concerned, is very true, on their undertaking to advance 30,000*l.* as first mortgagees; but it was expressly stated, in the surrender of the old lease, that Messrs. Greenwood, Cox, and Co. were to have a second mortgage for 30,000*l.*, part of their debt, and that *that* mortgage was not to interfere with any other security they might hold from His Royal Highness for their debt, or any part *thereof*. Supposing the plate to be of sufficient value to cover the amount of the debt to be secured, Messrs. Greenwood, Cox, and Co. do not see how it is possible for them, consistently with the rules that ought to guide them and every house of business, to wave their claim to the mortgage which might be available, and place the amount upon a species of security which would not be so, but, on the contrary, would prove a complete dead weight. If, as stated in the paper referred to, the house on being finished will with the premises be worth at least 120,000*l.*, and that it requires only 37,000*l.* to complete it, including 15,000*l.* for furniture, the sum required for all purposes, including the discharge of the two mortgages, will be still within the estimated value.”

About this time, at the request of Mr. Parkinson, as solicitor of the Duke, a statement of the account between him and Messrs. Greenwood was furnished to the Duke, and at the same time they wrote a memorandum, dated 9th August, 1826, in which they said: “In laying before Mr. Parkinson the statement of our general concerns with His Royal Highness the Duke of York, with reference more particularly to our claim on York House, we wish it to be clearly and distinctly understood, that if Mr. Parkinson has any other available security to propose on the part \* 250 of His Royal Highness, such as a \* professional man can offer, or such as any house of business can with any degree of propriety accept and receive, adequate to that portion of our debt which the mortgage is intended to cover, having the most un-

feigned wish and desire to meet and forward the views of His Royal Highness, we shall most gladly take the same into consideration."

The Duke after receiving this communication, still hoping to raise a loan in some quarter or another by means of his plate, wrote the following letter to Messrs. Coutts:—

"12th August, 1826. — Pray transfer the different chests of plate in my name in your house, to the name of Sir H. Taylor, for purposes for which I have given him instructions."

On the 13th of August, 1826, a meeting was held at the Treasury between the Earl of Liverpool, Mr. Frederick Robinson, Sir William Knighton, Mr. Herries, and Sir Herbert Taylor. At this meeting a great deal of discussion took place respecting a further loan from the Treasury to His Royal Highness, and it was proposed that of the sum secured to Messrs. Greenwood and Co. upon York House, a portion amounting to 10,000*l.* should be provided for by some other security. No person was present at that meeting on behalf of Messrs. Greenwood and Co., nor did they ever withdraw their refusal to accept the plate in substitution for their mortgage.

On the 15th of August, 1826, Sir Herbert Taylor wrote to Mr. Parkinson a letter, in the course of which he said: "I have been with Lord Liverpool, Mr. Robinson, and Mr. Herries, where I met Sir William Knighton. After some discussion, Lord Liverpool has authorised me to propose to His Royal Highness the following \* arrangement, which combines what has been \* 251 done or agreed to, and what they are further willing to do.

The Treasury agreed to take upon themselves to pay off the 30,000*l.* to Messrs. Coutts, considered as money advanced for the buildings. To pay whatever may be further required to complete the building (upon a fair account) exclusive of furniture, towards which 10,000*l.* have already been paid by them. They consider the other 10,000*l.* already issued by them to have been paid as a general assistance to His Royal Highness, and that they will make up that 10,000*l.* to 30,000*l.*, as an advance on the value of the lease of the house, and will pay the remaining 20,000*l.* of that sum to Messrs. Greenwood, or hold themselves responsible to them for it, leaving Messrs. Greenwood to find the security for the remaining 10,000*l.* (now secured on the house) in the plate."

Messrs. Greenwood insisted that they had never consented to abandon any part of their security upon the mortgaged premises.

But on the part of the Attorney-General, it was alleged that at the time of proposing these arrangements the knowledge of them was conveyed to Mr. Greenwood by Sir H. Taylor, and the proposal was acquiesced in. The Duke, on the 16th of August, wrote a short note to Sir. H. Taylor, in which he said : " Your letter, and Sir W. Knighton's explanations, are most satisfactory to me. The Government will give Mr. Greenwood the security of the 20,000*l.*, which is convertible by me for that purpose, and the residuary 10,000*l.* I am ready to have secured upon my plate."

On the 15th of September, Mr. Herries wrote to the Duke to say that the Commissioners of the Treasury were of opinion that " a priority of the purchase of the \* premises of which a lease has been granted to your Royal Highness should be secured to the Crown in preference to any private individual " ; that they had given directions for a communication with his solicitor for that purpose, " in order that such advances as your Royal Highness may require for the completion of the house and for discharging the encumbrances thereon, to an extent not exceeding the amount of the sums actually laid out upon the building, together with the value of the lease, which, as estimated by their professional advisers, my Lords apprehend to be about 30,000*l.*, may be so made from the funds at the disposal of the Commissioners, so as to give the Crown the priority of purchase in these premises."

To this last letter His Royal Highness returned an answer to the following effect : " I have to acknowledge the receipt of your letter of the 15th instant, conveying to me the information that the Lords of the Treasury had agreed to advance to me the necessary sums for the completion of my house in the Stable-yard, and to pay the encumbrances affecting it, and a sum of 30,000*l.* as the estimated value of the lease beyond the sum expended, on having a preference of purchase, in case I dispose of the same. I request you to state to the Commissioners that my understanding of the preference of purchase to be given to them and of the arrangement between them and me is — that I am to give them a security on the house for whatever sums they advance or pay to me — that in case I dispose of the house in my lifetime, and I should not have repaid the sums advanced, then that I should give my Lords Commissioners the offer of purchasing the same at a valuation ; and in case I should not dispose of the house in my lifetime, and

should not have paid off the whole of \* the sums advanced, \* 253 then that my representatives are to be bound to offer such house and property for sale to my Lords Commissioners in like manner. I am ready to sign the necessary instrument for carrying this arrangement into effect. Until that is done I shall consider this a binding agreement on the part of me and my representatives for carrying it into effect when called upon."

The Lords of the Treasury made from time to time advances which amounted before the month of December, 1826, to the sum of 47,000*l*. His Royal Highness died on the 5th of January, 1827. On the 31st of that month, Messrs. Greenwood instituted a creditor's suit against Sir Herbert Taylor and the other executors of the Duke of York, praying for an administration of his effects. On the 3d of February, the ordinary decree was made referring it to the Master to take an account, and to state the nature of the liens on the property.

On the 31st of March, 1827, the Commissioners of Woods and Forests paid off the mortgage to Messrs. Coutts given to secure the sum of 30,000*l*. and interest, and took an assignment of their mortgage securities. On the 11th of December, 1827, the same Commissioners were authorised by the Lords of the Treasury on the part of the Crown, to purchase the premises comprised in the lease of the 18th March, 1826, and all the estate and interest of the lessee, his executors, &c. and of all others claiming from or under him or them, for a sum of 81,913*l*. The purchase was made accordingly, but the purchase money was not paid. On the 14th of February, 1828, the Commissioners of Woods and Forests entered into a contract with the Marquis of Stafford, for a sale to him of the premises in question for a sum of 72,000*l*., and they took actual possession of the premises on the \* 5th of April, \* 254 1828, and transferred possession to the Marquis.

Mr. Greenwood died in January, 1832, and on the 9th of February in that year, Messrs. Cox and Hammersley, the surviving mortgagees, filed a bill of foreclosure against the Commissioners of Woods and Forests, the executors of the Duke of York, the Attorney-General, and the Marquis of Stafford, to have it declared that by virtue of the indenture of the 17th March, 1826, the sum of 30,000*l*., with interest due to them, became charged by way of a second mortgage on York House, and the premises comprised in the lease of the 18th of March in that year.



A decree was made by consent in this cause on the 25th July, 1834, which recited among other things the proceedings in the cause of *Greenwood v. Taylor*, and the desire of the Commissioners of Woods and Forests to pay off certain principal, interest, and costs thereafter mentioned, and by consent of all parties, it directed that the said Commissioners should be at liberty to pay the 30,000*l.*, and interest, due to the plaintiffs (*Cox and Co.*), in discharge of their mortgage, with costs; and that the plaintiffs and the executors of the Duke should execute such an assignment of their interest in York House, and in the mortgage, &c. as the Attorney-General should direct; but this was to be without prejudice to any question of lien on the plate on the part of the plaintiffs or of the Attorney-General, or to any proceedings in the cause of *Greenwood v. Taylor*, on behalf of the Attorney-General, as if the mortgage remained undischarged, with liberty to the Attorney-General to enforce such lien in the name of the plaintiffs, they being by him indemnified for the use of their names. And the

\* 255 plaintiffs were ordered to execute an \* assignment of such lien on the plate as they were then entitled to; and the deed was to contain all the necessary power to enable the Attorney-General to enforce such lien; but the executors were not to be taken as assenting to this claim of lien, and the order was to be without prejudice to the plaintiffs, as creditors of the Duke of York in any other character than as mortgagees for the 30,000*l.* and interest, to oppose the claim of the Attorney-General to such lien.

In pursuance of this order, an indenture bearing date the 18th of June, 1835, was made by the various parties concerned, for the purpose of carrying this decree into effect.

On the first of June, 1844, Master Brougham made his report in the cause of *Greenwood v. Taylor*, whereby he found that the Crown was entitled to a lien for 10,000*l.* and interest on the chests of plate; that the Crown was a legal mortgagee and a specialty creditor for the sum of 30,000*l.*, the amount of the mortgage to *Coutts and Co.*; that the Crown was also a specialty creditor for the amount of the rent on the existing and the surrendered leases, and was an equitable mortgagee in respect of all the other sums advanced, and the interest thereon.

THE ATTORNEY-GENERAL took exceptions to this report: first, that the Master had omitted to find that the Crown was entitled to pursue the remedies comprised in the several securities and the

covenants therein contained, executed to Coutts and Co. and to Greenwood and Co., and afterwards assigned to the Crown ; secondly, that the Master had omitted to find that the Crown was entitled to rank as a specialty creditor for the sum of 30,000*l.*, under the covenants in the mortgage deeds to Greenwood and Co. ; thirdly, a similar exception, founded on the covenants in the surrender of 17th March, 1826 ; \* and fourthly, that the \* 256 Master had not found that the Crown was entitled to interest on the rents accrued due since July, 1838, when interest was formerly claimed.

The executors of the Duke of York excepted to the report : first, that the Master had found that the Crown had a lien on the chests of plate for 10,000*l.* ; secondly, that he had found the Crown to be a specialty creditor for 30,000*l.* on the mortgage to Coutts and Co. ; thirdly, that the Crown was found to be a specialty creditor for the rent of the existing and the surrendered leases ; fourthly, that the Crown was found to be an equitable mortgagee in respect of the other sums advanced, with legal interest ; fifthly, that the Master ought to have found the Crown entitled to prove only as a simple contract creditor for 31,875*l.* 0*s.* 1*d.*

These exceptions came on to be heard before the Vice-Chancellor of England, and his Honour, on the 14th of April, 1845, made an order declaring that the purchase money due from the Treasury for the purchase of York House was applicable, in the first place, to the discharge of the sum due for principal and interest on the mortgage to Coutts and Co. ; secondly, to discharge the 30,000*l.* due on the mortgage to Greenwood and Co. ; and thirdly, in discharge of the other advances made by the Lords of the Treasury on the security of the premises : and thereupon the first, second, and third exceptions taken by the Attorney-General were declared to be overruled, and the second, fourth, and fifth exceptions taken by the executors were allowed. The Attorney-General abandoning the fourth exception taken by him, the first exception taken by the executors was allowed, but the third was overruled. The Attorney-General and the executors appealed against these decrees.

\* *The Solicitor-General (Sir J. Romilly and Mr. Twiss* \* 257  
for the Crown.

The most important question here is, whether the Crown is enti-

tled to rank as a specialty creditor for the sums secured under the covenants in the mortgage given to Greenwood and Co. The answer to that question ought to be in the affirmative. Where a creditor holds a mortgage security, and is also entitled, under covenants in that deed, to prove as a specialty creditor, he may recover as a specialty creditor, without prejudice to the security by mortgage. *Mason v. Bogg*.<sup>1</sup> Messrs. Greenwood and Co. could have done this originally, and the Crown having become the assignee of the mortgage deed, which gave them this right, is entitled to the same advantage. The question of the rights of parties in such a state of things was fully discussed in *Mason v. Bogg*, where the Vice-Chancellor's decree, made in the first of the suits in this case,<sup>2</sup> was considered, and was overruled. The real principle affecting such a case was well laid down by Lord Eldon in *Aldrich v. Cooper*,<sup>3</sup> that "if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor, having two funds, shall take that which, paying him, will leave another fund for another creditor." That was the principle acted on by Lord Cottenham in *Mason v. Bogg*. The rule applicable in bankruptcy, relied on by the Vice-Chancellor in *Greenwood v. Taylor*, is not applicable here, for a peculiarity founded on the principle of the bankrupt laws does not affect a case where no bankruptcy has taken place, and where the parties are not subject to the

\* 258 bankrupt laws. In *Perry v. Barker*,<sup>4</sup> and *Rome v. Young*,<sup>5</sup> the doctrine had been laid down in the same manner as it was afterwards stated by Lord Chancellor Cottenham in *Mason v. Bogg*.

With respect to the appropriation of the 81,913*l.*, the purchase money of the estate, the purchaser is not bound to pay it till a good title is made; and until that is done, the executors have no control over the purchase money. There are two prior considerations, — first, whether a good title can be made; secondly, whether a good conveyance of the vendor's interest can be made. The Crown took possession in 1828, but there is no case in which the mere taking possession is held a completion of the contract. It certainly is not a waiver of any objection to the title, or of any

<sup>1</sup> 2 Mylne & Craig, 443.

<sup>2</sup> *Greenwood v. Taylor*, 1 Russell & Mylne, 185.

<sup>3</sup> 8 Ves. 382, 391.

<sup>5</sup> 3 Younge & Collyer, 199.

<sup>4</sup> 13 Ves. 198.

act necessary to be done by the vendor. It is only a presumptive admission of a good title. The sale of an estate fails on failure of the vendor to get the parties who have claims to assign in discharge of those claims. In this case, the creditors must be paid their debt, interest, and costs, by the vendor, before the Crown can be called on to pay the 81,913*l*. If any private person had a claim for 47,000*l*. on these premises, it would be the duty of the vendor to discharge that claim before calling on the purchaser to pay. The Crown is in the same position as the private person would have been. There is no reason for saying that these mortgages were merged, by the fact of the assignee of the mortgagees becoming the purchaser of the property. Suppose the mortgages had remained in Messrs. Coutts and Co. and Messrs. Greenwood and Co., and the Crown had agreed to purchase, no one will pretend that the purchase money must have been paid to the vendor while these mortgages were so outstanding.

\* Suppose that the Crown had not purchased the house, \* 259 and that the Duke of York was still alive, the Crown could bring an action on the covenants, and could take what was available of his personal assets to satisfy the judgment; after which the Crown could go upon the mortgage security. The death of the Duke has not altered the rights of the Crown in this respect. The Crown can first prove for its whole debt against the personalty of the Duke, as far as it goes, and then the claim will be by so much the less against the house. The only difference occasioned by the death of the Duke is, that there can now be no action, because there is an administration suit, in which these parties have joined, and judgment given therein, and all the creditors must come in under that suit.

The Vice-Chancellor at first held that the Crown was a specialty creditor for the two sums; <sup>1</sup> but he afterwards changed his mind, and overruled the exceptions.<sup>2</sup> On the latter occasion he said: "I admit that when a payment is made, and the payer gives no direction as to its application, the rule *Solvitur ad modum recipientis* applies. But the nature of the transactions which took place between the Commissioners of Woods and Forests, on behalf of the Crown, and the representatives of the Duke of York, renders that rule inapplicable to the present case. The Lords of the Treasury directed the Commissioners of Woods and Forests to purchase, for

<sup>1</sup> 14 Simons, 512.

<sup>2</sup> 14 Simons, at p. 522.

81,913*l.*, not the equity of redemption, but the Crown lease of the piece of ground in the Stable-yard, with the capital messuage and offices, or part thereof, and all the premises composed in and demised by that lease, and all the estate and interest of the lessee, his executors, &c. and all others claiming from or under \* 260 him or them, in \* and to the said premises, under or by virtue of the said lease, and the Commissioners made the purchase accordingly. Therefore it is plain on the face of the transaction, that the 81,913*l.* was to be the consideration of the property, free from all encumbrances. That being the case, it became the duty of the Crown, on the 5th of April, 1828, when it took possession of the property, and thereupon became bound to pay the purchase money, to apply it in payment of what became due on the encumbrances, according to their priorities." That is a most dangerous doctrine. The purchaser is not bound to pay the purchase money till a proper conveyance is tendered, and he is not bound to pay off, nor see to the paying off, encumbrances at all.

The second question relates to the claim of the Crown to be a specialty creditor for 50,000*l.*, and to have a lien on the plate for 10,000*l.* The correspondence shows that though at first unwilling to accept the plate as a security for any part of the sum under mortgage, Greenwood and Co. afterwards so acted as to allow the Duke and the Lords of the Treasury to believe that that arrangement was acquiesced in. All the rights which Greenwood and Co. ever held as specialty creditors were transferred by assignment to the Crown.

The Crown also claims the right to be treated as a specialty creditor for the rents due under the leases before 1826. On this point, which is the subject of the cross appeal, the Vice-Chancellor agreed with the Master that the Crown was entitled as a specialty creditor to the rents that accrued due on the old leases. That part of the decree is correct. The argument that the covenants for payment of these rents were extinguished by the surrender of the leases is a mistake. Those covenants can still be en- \* 261 forced. *Newport v. Godfrey*,<sup>1</sup> *Nunns v. Gee*,<sup>2</sup> *Walls v. Cox*,<sup>3</sup> cited in that case, *Thompson v. Thompson*,<sup>4</sup> *Hartshorne v. Watson*,<sup>5</sup> and *Barnard v. Duthy*.<sup>6</sup> It is usual in a surrender of a

<sup>1</sup> 3 Levinz, 267.

<sup>2</sup> Cro. Eliz. 77.

<sup>3</sup> Cro. Eliz. 78.

<sup>4</sup> 9 Price, 464.

<sup>5</sup> 5 Scott, 506.

<sup>6</sup> 5 Taunton, 27.

lease to state a release of the rent then due ; but no such statement was made here, and the remedy for the rent remains as before.

*Mr. Bethell* (with whom was *Mr. Giffard*) for the executors of the Duke.

The course sought in this case to be taken by the Crown is against all equity. The Crown seeks to have all the advantage of purchaser and mortgagee at the same time. Yet the rights of the two characters are in opposition to each other. The Crown purchased on the express condition of paying off all the mortgages ; the terms of the letters of the 15th and 16th September, 1826, expressly show that this was the proposed arrangement from the earliest part of the negotiation ; yet it now claims to retain the purchase money and to leave all the mortgages unsatisfied. It cannot do so, but must be bound to fulfil its engagements. Having in the original contract undertaken to pay off the encumbrances, the Crown cannot, merely because it has become possessed of them in the interval, now insist that they are kept on foot.

Three points arise in this case. The first is, that the original contract contained terms by which the Crown bound itself to pay off the encumbrances ; secondly, the contract was one of ordinary purchase, and at the time it was entered into, the executors had the right to direct the application of the purchase money ; and thirdly, the \* Crown has sold the property, and received \*262 the money. It cannot, therefore, retain the money and yet deal with the security for which that money has been given as if the security had not been realized at all. Generally speaking, a mortgagee has a personal remedy and a real remedy ; but if he resorts to the personal remedy in the first instance, he leaves the estate unaffected ; but if a mortgagee has already sold an estate for, say 5000*l.*, part of his claim of 6000*l.*, and has got the 5000*l.* in his pocket, he cannot afterwards resort to the covenant for the whole 6000*l.* It may be true here, that large sums were in this case improvidently advanced by the Crown to the Duke ; but this is not the way in which the Crown can reimburse itself. The Crown here claims on an equitable title alone, and yet, admitting the purchase money to be in its possession, it asserts the right to apply that purchase money in a manner directly at variance with the original legal contract between the parties. The case of *Mason*

v. *Bogg*<sup>1</sup> has no application to the present, for it merely shows that where a man has a mortgage security, but is not in possession, and his security is unaffected, he may come in under a decree, in a common suitor's suit, in respect of the covenant contained in his mortgage. That case admitted of an election; but here the creditor could not make his election, for by having become a purchaser, his character as such put an end to his rights in the character of creditor. The Crown here was creditor on the mortgages, and debtor at the same time in respect of the purchase money; it owed the estate the purchase money, and that money was applicable in the first place to the discharge of the debts.

\* 263 Then as to the lien on the plate. The first question \* is whether Greenwood and Co. had a lien on it for the 10,000l.; and secondly, if so, was that lien transferred to the Crown under the deed of 1835? As the Crown can only claim a lien under Greenwood and Co., it follows that if those persons had not a lien, or if they had, but did not transfer it, the claim of the Crown was valueless.

As to the first of these questions, there are many circumstances which show that Greenwood and Co. had no specific lien on the plate for this 10,000l., but went upon their security on the house for the whole of the 30,000l.; and the very letters of the Duke, in which he urged them to accept the lien on the plate for part of that sum, showed that they had not accepted it. Mr. Greenwood did not consent to accept this lien; but even if he had done so, he could not thereby have bound his partners. One partner cannot bind the other partners by deed. *Harrison v. Jackson*.<sup>2</sup>

Secondly. If Greenwood and Co. had no lien, of course they could not transfer any; but assuming them to have had a lien, then it is contended that they did not transfer it to the crown. The previous argument used, to show that no such transfer of a security could be made by deed by one partner alone so as to bind the rest, may here be repeated; but further, no such transfer was made in fact. The bill in *Cox v. Arbuthnot* shows that the security upon which Messrs. Greenwood and Co. relied for the payment of the 30,000l. was that of the house; the answer to that bill does not controvert that fact: the decree founded on the bill and answer admits and establishes it, and the assignment of the mortgage made by Greenwood and Co. to the Crown was made

<sup>1</sup> 2 Mylne & Craig, 443.

<sup>2</sup> 7 Term Rep. 207.

under and by virtue of that decree, and is an assignment \* of a security for 30,000*l.* on the house. Under these \* 264 circumstances, it is impossible in point of fact that Greenwood and Co. could have claimed a lien on the plate for the 10,000*l.* which formed part of the mortgage debt; for their whole conduct from the beginning to the end was a denial of such a claim. It follows, therefore, that in respect of the 10,000*l.*, the Crown cannot claim under them any lien on the plate which formed part of the general effects of the Duke at his death.

Then as to the claim of the Crown to be ranked as a specialty creditor for the rents under the original lease, no such claim can be sustained. The surrender of the leases extinguished all title to sue upon the covenants contained in them. The cases cited have no application to the present. There can be no doubt that when a lease has expired, all the remedies given by that lease for the recovery of rent secured by it may still be enforced; but where the lease has been surrendered, the surrender operates as an extinguishment of the covenants; *Webb v. Russell*<sup>1</sup> and *Stokes v. Russell*<sup>2</sup> are in point. Whenever the relation of landlord and tenant is created by a demise reserving the rent with a reversion in the landlord, the rent is incident to that reversion; and if in the demise so made there is a covenant for the payment of the rent, the covenant is an accessory to the rent, and equally with it is incident to the reversion. Therefore it is, that by common law enforced by the Statute of Henry VIII., the grant of the reversion passes both the covenants and the rent. That is a first position recognised by the law. The second follows from it, and is equally well established; namely, that if the reversion is destroyed, the rent and the covenants, which \* are incidental to it, fall \* 265 with it, and there is no longer a power of distraining for the rent, nor of suing on the covenant; for each of them belonging to the reversion as an incident, and being held by virtue of it, falls the moment the reversion is destroyed. The rents in question were due under the leases of 1810 and 1824, as to which the reversion was in the Crown. The moment the Crown accepted the surrender of these leases, it ceased to have the reversion, the estate became an estate in possession, and operated a merger of the term, and the rent and the covenants fell with the reversion, to which they had been mere incidents and accessories. The cases

<sup>1</sup> 3 Term Rep. 393.

<sup>2</sup> 3 Term Rep. 678.



just quoted proceeded on these principles, and have never been disputed. The money due, if recoverable at all, was after surrender recoverable by the Crown in the character of a simple contract creditor, and in no other way, and the Crown is not entitled to rank as a specialty creditor in respect of these rents.

*Mr. Stuart* (with whom was *Mr. Calvert*) for Cox and Co., contended that after the transaction of March, 1826, the Crown became only a simple contract creditor in respect of the debts then purchased from Greenwood and Co.

*The Solicitor-General* in reply. — The memorandum given by the Duke of York shows that the encumbrances were not to be merged, but were to be kept up and full security given to the Crown for all the money that the Crown was to advance. According to the principle laid down in *Mason v. Bogg*,<sup>1</sup> the Crown will be entitled to go against the Duke's estate for the whole of these sums, and may afterwards resort, for what remains unpaid, to the proceeds of the sale of the house.

\* 266      \* No authority has been cited to justify the argument that the purchaser is bound to apply the purchase money in buying up claims or encumbrances.

As to the power of one partner to bind his copartners in a matter of this sort, the law has been laid down too broadly on the other side. The true principle was stated by Lord Tenterden, in the case of *Sandilands v. Marsh*:<sup>2</sup> "It has undoubtedly been held that in a matter wholly unconnected with the partnership, one partner cannot bind the others. But the true construction of the rule is this, that the act and the assurance of one partner, made with reference to business transacted by the firm, will bind all the partners." The act done here was done with reference to the business of the firm, as all the letters, particularly that of Mr. Cox, abundantly show. The firm was engaged in these money transactions with the Duke of York, and it was on account of the interests of the firm, and with reference to the ends of the firm, that any objection to the taking 10,000*l.* off the house and putting it on the plate was made.

1850. August 14.

LORD LANGDALE. — My Lords, Lord Cottenham has communicated to me in writing his opinion upon this case, and as the noble

<sup>1</sup> 2 Mylne & Craig, 443.

<sup>2</sup> 2 Barnewall & Alderson, 673, 678.

Lords who heard it with him concur in that opinion, he has asked me to read it to your Lordships, which I shall now do.

"There is in this case some complication of facts and some confusion, arising from the different interests of the parties; but if the facts are correctly considered as bearing upon the several points to be decided, much of the difficulty of the case will disappear.

"To avoid confusion, I propose to take separately \* the \* 267 different points raised by the several appeals, and to state so much of the facts as appears applicable to each of such points.

"The first point raised by the original appeal was as to the lien claimed by the Attorney-General upon the chests of plate belonging to the Duke of York, which were deposited at Messrs. Coutts and Co.'s. The Master found that the Crown had a lien upon the plate in such chests for the sum of 10,000*l*. To this finding the executors of the Duke of York took an exception, but Messrs. Cox and Co. did not. The Vice-Chancellor allowed that exception. From this order the Attorney-General has appealed, and it will be observed that the contest is therefore between the Crown and the representatives of the Duke, and that Messrs. Cox and Co. not having excepted to the finding of the Master in favour of the Crown, cannot now be heard in opposition to the Report, the propriety of which is in question upon this appeal.

"The leases of York House, or of the site upon which it stands, were mortgaged by the Duke of York to Messrs. Greenwood, Cox, and Co. for 30,000*l*., and subsequently to Messrs. Coutts and Co. for another sum of 30,000*l*.; but to which Messrs. Greenwood and Co. gave priority over their mortgage. More money being required to complete the house, negotiations took place between the Duke and Messrs. Greenwood, Cox, and Co., and the Duke and the Lords of the Treasury, upon which the present question depends. What passed between the Duke and Mr. Greenwood upon that occasion is not proved; but it is clear that the Duke understood that Greenwood, on the part of his house, had agreed to postpone their claim to any sum which the Treasury might advance for the completion of the building; for he \* so stated the fact to be \* 268 in his own answer to an inquiry by the Treasury on the 27th of June, 1826, stating also that the mortgage to Messrs. Coutts and Co. for 30,000*l*. was the only encumbrance upon the house. Upon this representation it appears that the Treasury advanced

two sums of 10,000*l.* each, and the Duke, in acknowledging such advances, agreed that upon the Treasury paying off the existing mortgage of 30,000*l.*, and advancing such further sums as might be necessary to complete the building, the Crown should have a right of pre-emption.

“ The negotiation with the Treasury continued, and on the 15th of August, 1826, Sir Herbert Taylor wrote to Mr. Parkinson, the Duke’s solicitor, stating, under the authority of Lord Liverpool, that the Lords of the Treasury would make up the second of the sums of 10,000*l.*, so advanced by them, to 30,000*l.* upon the value of the lease, and would pay the remaining 20,000*l.* of the sum to Messrs. Greenwood and Co., leaving them to find the security for the sum of 10,000*l.* (then secured on the house) in the plate. This proposed arrangement having been communicated to the Duke, he, in a letter to Sir Herbert Taylor, dated 16th August, 1826, expressed his approbation of it, and said, ‘ The Government will give Mr. Greenwood the security of the 20,000*l.* which is convertible by me for that purpose, and the residuary 10,000*l.* I am ready to have reserved upon my plate.’ In a Treasury minute of the 14th September, 1826, this arrangement was recited, and that it was expedient that such advances as the Duke might require for the completion of the house, and for payment of Messrs. Coutts’s debt, and of 20,000*l.* to Messrs. Greenwood and Co. (the latter agreeing to release the house on receiving that sum), upon

\* 269 the value of and on security for the \* whole on the lease and premises, should be furnished to the Duke, and directing the writing of a letter to the Duke, accepting his offer of pre-emption, and for making arrangements for making such advances as he might require for the completion of the house, and for payment of the two sums of 30,000*l.* and 20,000*l.* In pursuance of this minute, a letter was written to the Duke by Mr. Herries, informing him that the Treasury would make such advances as His Royal Highness might require for the completion of the house, and for discharging the encumbrances thereon. To this letter the Duke wrote an answer, dated 16th September, 1826, adopting and confirming the proposed arrangements. After this, and upon the faith, as it was alleged, of this agreement, the Treasury advanced sums of 5000*l.*, 10,000*l.*, and 12,000*l.* to the Duke ; and so the matter stood at the time of the Duke’s death, nothing further having, as it appears, passed in writing upon the subject of the plate ;

but it does not appear that Messrs. Greenwood and Co. were parties to the negotiation between the Treasury and the Duke, and they, in July, 1826, denied that they had agreed to transfer 10,000*l.* of their mortgage upon the house to a security upon the plate; but it is clear that they claimed some interest in the plate; for in a letter from Mr. Cox, dated 21st July, 1826, to the Duke's secretary, referring to a proposition to let in an additional sum of 10,000*l.*, in preference to their debt, he says to this it was signified that there could be no objection, supposing the plate to be a security for the balance remaining due to them, *ultra* the 30,000*l.* mortgage on the house. 'Our present advance in cash, in one way or other, for the accommodation of His Royal Highness, is at this moment not less than 115,000*l.*, for 65,000*l.* of which we hold an ultimate security on York House and \* the plate.' By in- \* 270 denture, 18th June, 1835, Messrs. Cox and Co. assigned to the Commissioners of Woods and Forests their mortgage of 30,000*l.*, and of the mortgage premises and all their interest as such mortgagees in the plate, but without prejudice to the claim of the Duke's estate, or of themselves as general creditors.

"If, therefore, Messrs. Greenwood and Co. had any title to or lien upon the plate, it is clear that such title or lien passed to the Crown; and that the Duke of York and Mr. Greenwood understood that they had such a lien, is manifest from the whole conduct of the Duke; and that Mr. Cox so understood it, would appear from his letter of the 21st July, 1826. But there is so much of obscurity over this transaction, that it would be very unsatisfactory to have to decide the question upon any conclusion to be drawn from the evidence upon that point. Fortunately, that is not necessary, because, whether there was or not any contract between the Duke and Messrs. Greenwood and Co. to throw 10,000*l.* of their 30,000*l.* mortgage from the house upon the plate, it appears to me that, as between the Duke and the Crown, it is not competent for the Duke's representative to dispute or repudiate such an arrangement. The Duke, owner of the plate and of the house, subject to a mortgage for 30,000*l.*, represents to an intending purchaser of the house that he had agreed with the mortgagee that the mortgage upon the house should be reduced to 20,000*l.*, the mortgagee accepting the security of the plate for the remaining 10,000*l.* Upon the faith of this representation, the purchaser agrees to pay a certain sum for the house, as subject

to 20,000*l.* only, and pays such purchase money. The mortgagee afterwards disputes the alleged agreement as to the plate, and, filing a bill of foreclosure, obtains payment of the

\* 271 \* whole 30,000*l.* from the purchaser. Can the vendor, as against such purchaser, take the whole of the plate for his own use, or is it not pledged to make good to the purchaser the 10,000*l.* he has been compelled to pay, and so to give effect to the representation under which the purchase was made and the purchase money paid? I am of opinion that this equity arises for the relief of the purchaser. The representation is equivalent to a contract that 10,000*l.* of the value of the plate shall be applied in exoneration of so much of the 30,000*l.* mortgage upon the house. It is, indeed, hardly necessary to resort to an implied contract. The Duke's letter to Sir Herbert Taylor of the 26th of August, 1826; the Treasury minute of the 14th of September, and Mr. Herries's letter of the 15th of September, and the Duke's answer of the 16th of September, 1826, amount to a positive contract for that purpose. It appears to me, for these reasons, that, whether Greenwood and Co. were or were not bound to take 20,000*l.* in full for their mortgage upon the house, looking to the plate for the remaining 10,000*l.*, the Crown was and is entitled, as against the Duke and his estate, to insist upon such mortgage being considered as of the amount of 20,000*l.* only, and that, having been compelled to pay 30,000*l.*, the Crown is entitled to have the 10,000*l.* raised and repaid out of the proceeds of the plate, and consequently, that the Master's report was in this respect right, and that the Vice-Chancellor's order ought to have been to overrule the first exception, and that the order allowing it ought now to be discharged.

"The second exception taken by the representatives of the Duke was, because the Master had reported that the Crown was a legal mortgagee and specialty creditor for the 30,000*l.*

\* 272 mortgage money paid to Messrs. Coutts. \* Now, that Messrs. Coutts were legal mortgagees and specialty creditors is not disputed; and, by indenture of the 31st of May, 1827, they assigned their mortgage, and the mortgaged premises, to the Commissioners of Woods and Forests, and their covenant, with liberty to sue upon it in trust for the Crown. The Crown thereby was placed in the same situation that Coutts and Co. had before occupied; and unless it was not competent or possible to keep

the security alive, the Crown became both legal mortgagee and specialty creditor as against the Duke and his estate. The equity of redemption remained vested in the representatives of the Duke ; for by the Act of Parliament of 1851, it appears that, though the contract for the purchase of the interest in the lease was made on the 14th of February, 1828, it had never been carried into effect.

“ The Duke died in January, 1827, indebted by the covenants in the mortgages to Messrs. Coutts in 30,000*l.*, and to Messrs. Greenwood and Co. in another sum of 30,000*l.*, which became vested in the Crown, — the first in May, 1827, and the other in June, 1835, — the lease never having been vested in them, but being, under the authority of the Act of 1841, transferred direct to the Duke of Sutherland. So far there does not appear to be any difficulty, and I do not understand that the Vice-Chancellor<sup>1</sup> had any doubt of the Crown’s title as mortgagee and specialty creditor up to the 5th of April, 1828, when the purchase money was payable. But he considered that, from that time, the mortgages were to be considered as paid out of the purchase money, and consequently that the mortgages and covenants ceased from that day to exist. That upon the sale of property subject

\* to a mortgage for its full value, it is the duty of the ven- \* 273  
dor to pay off the mortgage, is certain, if the purchaser has not the prudence to see that done, and take his title from the mortgagee ; but that is not likely to arise ; for what purchaser would pay the full value of property to the owner of the equity of redemption, thus leaving the mortgage a charge upon the property, and parting with the money out of which it ought to be paid ? In the judgment under appeal, it is laid down as a rule of equity, that, upon a purchase of property subject to encumbrance, for the full value, it is the duty of the vendor to apply the purchase money in payment of what is due on the encumbrances, according to their priorities. If there be any such rule, it can only arise upon an implied contract in the improbable case supposed of a purchaser paying the full value to the owner of the equity of redemption, trusting to his paying off the mortgage without any specific contract for that purpose ; for to whom can this duty be due but to the mortgagor, who is interested in being relieved from all personal responsibilities for payment of what is due upon the mort-

<sup>1</sup> 14 Simons, 525.

gage? It must be the subject of implied or expressed contract; but what is the evidence of either in the present case? At the time of the assignment of Messrs. Coutts's mortgage by indenture of the 31st of March, 1827, the debt and the covenant, and all the remedies, were assigned, and from that time remained vested in the Crown. In December, 1827, the Crown contracted to purchase the equity of redemption, but such purchase was not carried into effect until 1841. It was not, however, proposed that 81,913*l.*, the estimated value of the premises, should be paid to the vendors, trusting to their discharging the mortgage; but, on the contrary, \* 274 the amount of Messrs. Coutts's mortgage was considered as still due and owing, and such amount was to be deducted from the purchase money.

"So matters continued until the Act of 1841, during which time there can be no doubt of the Crown being a mortgagee and specialty creditor in respect of Messrs. Coutts's mortgage. By the Act of 1841 the purchase was complete; but it was provided that, as regards the accounts between the Crown and the estate of the Duke of York, the same should be taken and adjusted in all respects as if the Crown lease had not been assigned in pursuance of the Act, and as if the Act had not passed. The Crown therefore continued a mortgagee and specialty creditor after that assignment as much as before, and was so at the time of the report. A similar course was adopted as to Messrs. Greenwood and Cox's mortgage. The decree of 28th July, 1834, to which the Duke's representatives were parties, directed by consent the payment to Greenwood and Co. of what was due to them upon the mortgage; but this was to be without prejudice to the claim of the Crown upon the plate, as to which the mortgagees were to assign all their lien and interest to the Crown, with all remedies to enforce the same; and by the deed dated 18th June, 1835, executed upon payment of such mortgage, and to which the representatives of the Duke were parties, the same reservation is made, and the debt is assigned to the Commissioners of Woods and Forests in trust for the Crown, with full power to demand, sue for, and recover the same, and to use the names of the mortgagees for that purpose.

"At this time the Commissioners for the Crown, by the contract of 11th December, 1827, were purchasers of the lease from the Duke's representatives; but so far from there being ground

for implying any contract to \* pay off and destroy the mort- \* 275  
gage debt, there is an express contract and provision for  
keeping it alive, by which the Duke's representatives, as parties to  
the decree and to the deed, are bound.

"I am therefore of opinion that the Master's Report was correct in finding that her Majesty was a legal mortgagee and specialty creditor for the amount of Messrs. Coutts's mortgage, and that the second exception of the representatives of the Duke ought therefore to have been overruled, and that the order allowing the exception ought to be discharged.

"The third exception of the representatives of the Duke disputes the Master's finding that the Crown is a specialty creditor for the arrears of rent reserved by the leases. I cannot find any ground for this proposition; the personal covenant is independent of the estate in the property mortgaged, and is not affected by its surrender or other determination.<sup>1</sup> The order of the Vice-Chancellor, overruling the exception, ought therefore, in my opinion, to be affirmed.

"The fourth exception of the representatives of the Duke applying to other sums, was, as I understand, intended to refer to the advances for building made by the Crown to the Duke. It is, I think, clear that all such advances were made upon the security of the premises, and that the Crown obtained an equitable lien thereon. The Duke's letter of 16th September, 1826, is conclusive upon this point, and indeed the order appealed from so treats these advances. This fourth exception of the representatives of the Duke ought, in my opinion, to have been overruled, and the order allowing it ought to be discharged.

"The fifth exception of the representatives of the Duke appears to be consequential upon the others before  
\* observed upon, and ought, in my opinion, to have been \* 276  
overruled, and the order allowing it ought therefore to be  
discharged.

"What I have said upon the third exception disposes of the cross appeal of the representatives of the Duke, and as, in my opinion, there was no ground for that appeal, I think it ought to be dismissed, with costs.

"With respect to the exceptions taken by the Attorney-General, the first asserts merely a consequence of the facts found by the

<sup>1</sup> See *Grey v. Friar*, 4 House of Lords Cases, at p. 577.



Master ; and as to the second exception, I have not been able to discover any reason for the Master having confined his finding to Messrs. Coutts's debt and omitted Messrs. Greenwood's. That Greenwood's advances constituted a mortgage and specialty debt under the covenant is not disputed, and that they amounted to 30,000*l.* is admitted by several documents, and particularly by the deed of 18th June, 1835, to which the representatives of the Duke were parties. It appears to me, therefore, that the Master ought to have found that the Crown was a specialty creditor as to the money paid in discharge of the mortgage to Messrs. Greenwood and Co. ; but as the Master was only to inquire as to the specialty debts, I do not think he ought to have done more than find such facts, leaving the consequences to further directions. I think, therefore, that upon the first exception of the Attorney-General, the Master having found that the Crown was a specialty creditor as to the money paid on account of Coutts's mortgage, he thereby answered the inquiry directed ; that the exception insisting that he ought to have reported this cannot be maintained, and that this exception ought for this reason to be overruled, and that the order for that purpose is correct. Upon the second and third I

\* 277 am, for the same reasons, of opinion that the Master \* ought to have found that the Crown was a specialty creditor for the sums paid in discharge of the securities to Messrs. Greenwood, Cox, and Hammersley ; but that he ought not to have found what is suggested beyond that by the second and third exceptions.

" I think, therefore, that the order overruling these exceptions should be discharged, and the above declaration substituted ; which disposes of the whole case.

" Upon the Attorney-General's appeal, the order appealed from having been altered, there cannot be any costs."

*The Attorney-General (Sir J. Romilly).* — Will your Lordships permit me to observe, that you will probably give the costs of the exceptions in the Court below, which I did not understand to be given by the order. Your Lordships will make now, for the Court below, the order which that Court ought to have made when the case was before it, in which case the exceptions of the representatives of the Duke of York will be overruled with costs, and costs will also be given on such of the exceptions of the Attorney-General as were improperly disallowed in the Court below.

LORD LANGDALE. — Were the exceptions of the Attorney-General in the Court below such as are mentioned in this judgment?

*The Attorney-General.* — Yes, my Lord.

LORD LANGDALE. — You have appealed from the decision of the Vice-Chancellor?

*The Attorney-General.* — Yes, my Lord ; but the decision which your Lordships have now given states what the order is which the Vice-Chancellor ought to have made, — that he ought to have disallowed all the exceptions of the representatives of the Duke, and that \* he ought to have disallowed two of the \* 278 exceptions of the Attorney-General. I should ask your Lordships, therefore, that the invalid exceptions might be disallowed with costs in the usual manner ; that is to say, the costs incurred in the Court below.

LORD LANGDALE. — You have asked for the costs of these exceptions ; you ought to have appealed against that part of the judgment of the Court below.

*The Attorney-General.* — I have appealed against the judgment, and therefore against the consequences of it. I understand the usual mode in which your Lordships deal with cases of this description is, that you make the order which the Court below ought to have made. Now that Court, according to your Lordships' decision, ought to have overruled those exceptions in the usual manner, — that is, with costs. Your Lordships now direct the Court to overrule the exceptions, and consequently you direct them to be overruled with costs.

LORD LANGDALE. — That is so, Mr. Attorney-General.

An Order to the following effect was afterwards entered on the Journals : " It is ordered and adjudged, that so much of the said order of the Court of Chancery of the 14th of April, 1845, as declares that the purchase money in question, due from the Lords of the Treasury, under the contract for the purchase of York House and premises in the Master's Report mentioned, is applicable, in the first place, to the discharge of the sum due for principal and interest on the mortgage security of Coutts and Co. ; and secondly, of the sum due for principal and interest on the mortgage for 30,000*l.* in favour of Greenwood and Co. ; and thirdly, in discharge of the other advances made by or on behalf of the Lords of the Treasury, on security of the premises mentioned in the Master's Report ; and as thereupon orders that the second and third exceptions taken by the Attorney-General be overruled, and that the second, fourth, and fifth exceptions taken by Pearce and \* Nutting be allowed, and that the first exception taken by \* 279 them be allowed, be, and the same is hereby reversed. And it is further

ordered and adjudged, that the said order, so far as it directs that the first exception taken by the Attorney-General, and the third exception taken by Pearce and Nutting, be overruled, be, and the same is hereby affirmed. And as to the first, second, fourth, and fifth exceptions, taken by Pearce and Nutting, it is declared that the same ought to have been, and that the same be overruled. And as to the second and third exceptions taken by the Attorney-General, it is declared and adjudged that her Majesty is a specialty creditor for the sum of 80,000*l.*, the amount of the principal of the mortgage to Greenwood and Co., and the interest thereon, and that the Master ought so to have found by his report. And it is further ordered, that the cause be remitted back to the Court of Chancery to proceed and do therein as shall be just and consistent with these declarations and orders and this judgment. And that the cross appeal of Pearce and Nutting be dismissed. And that the appellants in the cross appeal do pay the Attorney-General the costs incurred by the respondent in respect thereof. — Lords' Journals, 1850, p. 488.

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\* GEILS v. GEILS.

1851. May 8.

JOHN EDWARD GEILS, *Appellant*.FRANCES GEILS, *Respondent*.

*Appeal. Competency of. Pleading. Dilatory Defence. Practice. Right to begin. Costs.*

A plea which does not merely raise an objection to a particular form of proceeding, leaving it to the plaintiff to proceed in a different form at another time, but which, if allowed, entirely bars the plaintiff from his remedy, is a peremptory and not a dilatory plea, within the 6 Geo. IV. c. 120, § 5, and a decree thereon may be subject of appeal to this House.

A Scotchman was married in England to an Englishwoman, and then returned to Scotland, where he was domiciled. Some years afterwards, the wife quitted Scotland and returned to England, where she lived separate from her husband. He came to England, and instituted proceedings in the Arches Court for a restitution of conjugal rights. The wife, in her responsive allegations, charged him with adultery, and on that charge prayed for a divorce *a mensâ et thoro*. Judgment was given in her favour. The husband returned to Scotland, where the wife instituted a suit for divorce *a vinculo*. The husband pleaded the proceedings in the Arches Court as a bar to further proceedings in Scotland: — *Held*, that this plea raised a peremptory or substantial defence, and that a judgment thereon might be made the subject of appeal to this House.

Where a petition to dismiss an appeal for incompetency has been directed by the Appeal Committee to be argued at the bar of the House, the counsel for the petitioner is entitled to begin.

The petition was dismissed, but the costs were reserved.

THE respondent in this case was the wife of the appellant, and on the 17th of May, 1849, instituted an action of divorce against him in the Court of Session, upon the ground of adultery. She was an Englishwoman, the daughter of Charles Dickinson, Esq., of Farley Hill, in Berkshire, and on the 8th of October, 1838, was married by license, at the church of Swallowfield, in that county, \* to Mr. Geils, a domiciled Scotchman, whose resi- \* 281 dence was in Dumbartonshire. They went to Scotland directly afterwards, and remained there till 1845, when Mrs. Geils, on account of alleged adultery on the part of her husband, quitted his house, and came to England. The summons alleged acts of adultery with certain women, specially named, and prayed for a divorce *a vinculo matrimonii*. Mr. Geils put in defences, in which, besides denying the alleged acts of adultery, he stated that, in October, 1845, Mrs. Geils had instituted a suit against him<sup>1</sup> in the Arches Court of Canterbury, founded upon the same grounds of charge as those now set up in the suit in the Court of Session; and that in April, 1848, that Court of Arches pronounced a sentence of separation *a mensâ et thoro*. He then put in six pleas in law: first, denying the jurisdiction of the Court of Session, as the wife was a native of England, and the marriage had been solemnized in England, and according to the forms of the English Church; secondly, that the suit and decree in the Arches Court were a bar to further proceedings in Scotland; thirdly, that the charges were vague in themselves, and not properly laid; fourthly, that as the alleged acts of adultery took place before August, 1843, with parties some of whom are now dead, the delay was a bar to the suit; fifthly, that there had been condonation, or, as it is called in the Scotch law, *remissio injuriarum*; and sixthly, that the charges were untrue. On the 16th of November, 1849, Lord Wood, the Lord Ordinary, repelled the first preliminary defence, reserved the second until satisfactory evidence of the nature of the proceedings \* in the Arches Court should have been adduced, \* 282 repelled the third in part, but allowed the remainder to become the subject of proof, and repelled the fourth. The Lord Ordinary directed that the opinions of English counsel should

<sup>1</sup> This allegation in the plea was not correct in point of fact. The suit in the Arches Court was instituted by the husband (both parties being then in England) for restitution of conjugal rights, and the wife set up the husband's adultery in the form of responsive allegation, and prayed relief thereon.

be taken on the subject of the second preliminary defence, and considering these opinions, he repelled that defence. This interlocutor was appealed against, but was confirmed by a majority of the Judges of the First Division of the Court of Session, Lord Fullerton being the only dissentient. The present appeal was brought against the Lord Ordinary's interlocutor, and the Judges of the First Division affirming it, the question intended to be raised by the appeal was, whether the decree obtained by Mrs. Geils, as a defendant in the Arches Court, for a divorce *a mensâ et thoro*, prevented her from asking as a plaintiff or pursuer in the Scotch Courts for a further and more complete remedy.

No leave to appeal had been given by the Court of Session.

Mrs. Geils, instead of putting in an answer to this appeal, presented a petition that it might be dismissed as incompetent. The Appeal Committee directed that the question of incompetency should be argued in the House by one counsel on a side. That question depended on the construction to be put on several statutory enactments regarding appeals.

The 48 Geo. III. c. 151, § 15, enacts, "that no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the division of the Judges pronouncing such interlocutory judgment, or except in cases where there is a difference of opinion among the Judges of the said division." The Scotch Judicature Act, 6 Geo. IV. c. 120,

§ 5, enacts, "that it shall be the duty of the Lord Ordinary,  
 \* 283 at the first calling of the cause before him, to \* hear the parties on the dilatory defences, with power to reserve consideration on such dilatory defences as require probation until the peremptory defences shall be pleaded and the record adjusted," and "that the judgment of the Lord Ordinary on the dilatory defences shall be final, unless the pursuer, where the defences have been sustained, and the action dismissed, shall, within twenty-one days," on certain conditions therein expressed, appeal to the Inner House; "and it shall not be competent to appeal to the House of Lords against the interlocutory judgment, where the action is not dismissed, unless express leave be given by the Court, reserving the effect of the defence, if an appeal should afterwards be taken in the cause when finally decided."

The petitioner contended that, under these sections of the Stat-

utes, this appeal was incompetent, because the defence overruled was a "dilatory defence"; because, by the overruling of it, the action was not dismissed, and because, the action not being dismissed, no express leave to appeal was given.

When the appeal was called on, a discussion arose as to the right to begin.

*Mr. Anderson*, for the husband, contended that he, representing the appellant against the decree of the Court below, ought first to be heard.

THE LORD ADVOCATE (MR. MONCRIEFF), submitted that a petition to dismiss an appeal made the petitioner the actor, and was in the nature of a preliminary objection, the person taking which ought first to be heard in support of the objection.

THE LORD CHANCELLOR decided that, where a petition was presented against the competency of an appeal, and that petition was referred by the Appeal Committee to the House, the petitioner stood in the situation of an appellant, \* so far as \* 284 the petition was concerned, and was entitled to begin.

THE LORD ADVOCATE, for the petitioner, accordingly began.

The husband here pleaded a plea, denying the title of the wife to sue in the Scotch Courts. That plea was, in the Court below, properly treated as constituting a dilatory defence. It is a formal, and not a substantive answer to the action. This, at least, is the rule in the Scotch Courts, as is shown by the facts that it was heard and decided before the record was closed, and that, on repelling this plea, the Lord Ordinary found the party liable in expenses, which he could not properly do, according to the practice of the Courts, on a substantive defence, without hearing all the particulars of the case. If the plea had constituted a peremptory defence, the husband ought to have reclaimed to the Inner House not to have the plea sustained, as simply capable of being pleaded, but to have the judgment reversed, and the case sent back to the Lord Ordinary. The husband is, therefore, bound by what occurred in the Court below. The case of *Laidlaw v. Dunlop*<sup>1</sup> is in point here. In that case, an action was brought to compel a copartnership account; and the fifth plea in law was, that, under the deed of partnership, all disputes between the partners were to be submitted to the arbitration of Mr. Cunninghame, advocate (afterwards Lord

<sup>1</sup> 9 Shaw & Dunlop, 579.

Cunninghame). The Court held, that that plea, being one in bar of that action, constituted a preliminary defence, and not having been discussed before the record was closed, the Court could not afterwards receive it. The Statute, therefore, applies here, and no leave to appeal having been granted, the decision of the Court below is final.

\* 285 \* *Mr. Anderson*, for the husband. — Nothing has occurred in the Court below to deprive the appellant of his right of appeal. The plea here was a substantive answer to the action. The distinction between dilatory and peremptory defences is well taken in Balfour's Practicks,<sup>1</sup> where it is said: "There are two kinds of exceptions or defences; for some are dilatory and some are peremptory. Dilatory prolong and delay the action or claim to a certain time, and therefore are temporal, and should be propounded before *litis contentatio*; whereof some are declinatory of the judgment, as exceptions of the incompetency of the judge, or of *litis pendentis*: and others are properly called dilatory, as when any man craves his debt before the time. Peremptory exceptions are perpetual, because they stay allutterlie [entirely], and forever cut away the action or claim, and resist and stop the same at all times; as exceptions of payment, sentence, oath, transaction,<sup>2</sup> prescription, and others." To the same effect is Lord Stair;<sup>3</sup> but mentioning, among the dilatory defences, an objection to the competency of the process, irrelevancy, he adds that such a defence "hath the effect of a peremptory defence, where the other party hath no other legal means to attain the conclusion proposed"; in other words, no other legal means of proceeding. Here, if this defence of competency is sustainable, it will prevent all future proceedings, and it is, therefore, according to Lord Stair's authority, a peremptory defence, and a judgment upon it is consequently a proper subject of appeal. Forbes's Institutes,<sup>4</sup> Bankton.<sup>5</sup> The latter authority describes a peremptory defence as that which,

\* 286 "if true, puts \* an end to the cause, — *perimit causam*."

Such is its effect here, and therefore it falls under Erskine's definition<sup>6</sup> of peremptory defences, among which he expressly in-

<sup>1</sup> P. 343, c. 1.

<sup>2</sup> Agreement for the settlement of controverted claims. Bell. Dict. voce Transaction.

<sup>3</sup> Institutions. Appendix to Bk. IV. tit. 39, § 13, p. 792.

<sup>4</sup> Pt. IV. Bk. I. c. 2, tit. 1.

<sup>5</sup> Bk. IV. tit. 25, §§ 2, 4, and 5.

<sup>6</sup> Institutes, Bk. IV. tit. 1, § 66. See also Principles, Bk. IV. tit. 1, § 39.

cludes the plea "that the question hath already received a final decision," namely, those which, *perimere causam*, put an end to or exhaust the cause; for they not only free the defender from the *instantia* or *lis pendens*, but totally extinguish the pursuer's right of action upon that claim." This definition has been adopted in Bell's Dictionary of the Law of Scotland,<sup>1</sup> Russell's Forms of Process,<sup>2</sup> Darling's Practice,<sup>3</sup> and Shand's Practice.<sup>4</sup> This House has acted on the principle of treating a defence like this as a substantive, and not as a mere dilatory defence, in the case of *Warrender v. Warrender*,<sup>5</sup> because, although preliminary in form, it went altogether to bar the right of action. *Gordon v. Clyne*<sup>6</sup> is to the same effect, and there an appeal was held competent without leave of the Court.

THE LORD ADVOCATE, in reply. — This plea has either been treated as a preliminary defence, and then the appellant is not entitled to be heard at all, or as a peremptory defence, and then he has no right to be heard till the record here is complete. —

[THE LORD CHANCELLOR. — The section uses the word "dilatory," not "preliminary."]

For this purpose the words are identical. The case of *Warrender v. Warrender* does not apply to the present, for there the defender set up a personal right of exemption from the jurisdiction of the Scotch Courts in any form \* whatever, or at \* 287 any time whatever. Nor is the case of *Gordon v. Clyne* applicable, for there the judgment was given on a closed record. Here the appeal is bad in form if the defence is peremptory, for then the case ought to be sent back to the Court in Scotland to pass through a different process. It was decided there before the record was closed, and it does not put an end to any right of action, but merely determines that that which has now been adopted is not competent. If so, it is a mere decision on the form of proceeding — it was so treated by all parties in the Court below; — it cannot be said *perimere causam*, and consequently, even under the authority of the text-writers quoted on the other side, cannot be treated as a subject of appeal to this House.

<sup>1</sup> Voce Defences.

<sup>2</sup> Pt. III. c. 2, § 2, vol. 1, p. 198.

<sup>3</sup> P. 53.

<sup>4</sup> Vol. I. p. 317.

<sup>5</sup> See Lords' Journals, for 1834, pp. 833, 945; 2 Clark & Finnelly, 488.

<sup>6</sup> Maclean & Robinson, 72.



THE LORD CHANCELLOR. — My Lords, this case has come before your Lordships by a reference from the Appeal Committee. It appears that the respondent to an appeal which had been brought to your Lordships' House, presented a petition against the reception of this appeal, alleging that it was incompetent to the party who had brought it.

That petition, praying your Lordships to dismiss the appeal as incompetent, stated as the ground, "Because the interlocutors appealed from are interlocutors repelling a preliminary or dilatory defence, and against such interlocutor no appeal to the House of Lords is competent, unless with express leave of the Court of Session, which leave has in this instance been refused." That was the ground on which the party prayed your Lordships to hold the appeal to be incompetent, and that of course was the ground on which the party (the respondent) in that latter petition came to answer it.

This question arises upon the Statute of the 6 Geo. IV. c.

120. Your Lordships have heard during the argument,

\*288 \* what is provided for by the 5th section of that statute.

[His Lordship read the section.] That section, as your Lordships observe, deals entirely with dilatory defences, and the ground upon which this appeal is asked to be deemed incompetent by your Lordships is, that under that section so dealing with dilatory defences, the plea here put upon the record must be deemed a dilatory plea, and that it was not competent to the party so pleading to appeal without the leave of the Court, and that the Court in this instance, although it was asked, gave no such leave.

It becomes therefore necessary, in order to decide on the petition, to consider whether the case does fall within the section to which I have referred ; in other words, whether the plea, the second defence in this case, is to be deemed a dilatory defence, or whether it is entitled to be considered as what is described as a peremptory defence. Was it a defence which tended to delay the pursuer, and which presented no substantial answer to the case, nor offered any defence to the justice or law of the claim, supposing it to be properly prosecuted ?

Your Lordships have been referred to various text-books on that subject. I own it does not appear to me that there is any difference in the authorities on that subject, nor does it appear to me that there is any difficulty in coming to a satisfactory conclusion as

to what is entitled to be considered as a peremptory plea or defence. The distinction is well known in England, and it is also as well known in Scotland, and is dealt with frequently in both countries. There are various rules applicable to pleas of those two classes, each of those two classes differing from the other, and it can excite no surprise that the proceeding should be more strict and should be more prompt, where a defendant does not defend himself against the claim or right which is set up on the part of the plaintiff or pursuer, \* but where he merely answers the form of \* 289 the proceeding, leaving the pursuer or plaintiff, therefore, without any answer whatever to the justice or to the law of the claim.

Looking at the authorities which have been cited, — and I am inclined to think that all the authorities have been cited which were calculated to afford your Lordships any light or information, — it appears to me that, although there are some words to be found in certain of the passages read which admit of two senses, yet that where the words have been used by the author in the same sense, the same conclusions have followed.

I apprehend that there is really no difficulty in determining what is to be considered as a dilatory defence, and what is to be considered as a peremptory defence. That defence which gives no answer to the plaintiff's claim, but which merely points out some irregularity or some circumstance which may well consist with the plaintiff's claim being in point of law perfectly undoubted, which offers no answer to it, and in that respect leaves it perfectly untouched, so that the plaintiff may, by instituting a suit in some other form or at some other time, be well entitled to maintain it, such a defence I conceive to be dilatory. But I can in no sense understand the word "dilatory" to apply to a plea which leaves nothing to be decided in the case in which that plea or defence is urged, and which leaves the pursuer no case on which to go at any other time to any other Court or tribunal, or to adopt any proceeding in any other form. That defence which says, not that you are not entitled to redress in this particular instance, in this particular suit, or in this peculiar form of proceeding, but that you have no case which entitles you in any form to redress, I consider to be peremptory, and not intended to be comprised within the class of dilatory defences.

Now what is the plea or defence in the present case? It

\* 290 \* is, even if that you, the pursuer, have sustained the wrong of which you complain, you have prosecuted for that wrong, and have obtained the full redress to which that wrong entitles you. You had the option of coming to this Court ; if you had thought fit, — you had time to do so ; but when you were sued in England, by process, for a restitution of conjugal rights, you did not content yourself with merely answering that case, saying that the conduct of the husband who claimed restitution of the conjugal rights had been such as to forfeit his claim to that restitution, but you on your part claimed certain relief in respect of the injury you had sustained. You must be taken to have been aware of the extent of that relief which you claimed ; and that relief, to the extent which you claimed and which you were entitled to claim, was afforded you to the full. You have therefore made your election, and have obtained a judgment which pronounced a divorce, *a mensâ et thoro*, between you and your husband. This is a suit instituted for the same cause, and your ground is merely that the judgment which you have obtained did not give you such an extensive relief as you might have obtained if you had prosecuted your case in this Court.

No doubt in England marriage is indissoluble except by Act of Parliament ; but the law in Scotland is otherwise. But it seems to me that if in England, as would be the case in Scotland, proceedings are instituted in respect of a particular injury, or if in the course of a suit instituted for a different purpose than that of obtaining redress for any such injury, the party who has sustained the injury sets it up in that form not merely with a view of repelling the object of the suit, but for the purpose of obtaining substantial benefit and relief, such as might have been the subject of a distinct and independent suit by the party so setting it up,

\* 291 such a case must be considered as resting \* precisely on the same ground as if the proceeding itself had been instituted by that party, and that though he is in form the defendant, he would be in the same situation as a plaintiff suing for and obtaining the same relief would be.

I consider, therefore, that, first of all, this defence is put in, is pleaded, and is offered as an entire answer to the case made on the part of the pursuer. It does not follow that, in point of law, it will be an answer, but it is pleaded with the intention of contending and of arguing that it is an entire answer to all claim on

the part of the pursuer ; and the question before this House now is, not, whether the party is correct in supposing that the plea does disclose a full and effectual answer to the pursuer's claim ; but if it is so offered, and if, being so offered, it can be considered as falling within the description of a dilatory plea ; it strikes me that there is no ground for that conclusion.

The learned counsel, with a candour for which I think the House is indebted to him, declined to argue whether this was a dilatory or a peremptory plea, but sought rather to relieve himself and the House from a question on which no reasonable doubt could be entertained, by setting up another ground on which to entitle the party to the benefit of the petition ; namely, that the parties have so treated it, and have so dealt with it in the Court in Scotland. But, my Lords, that was not the ground on which the petition was presented. The petition was presented simply and solely, and the reason and ground urged in its support was the character of that plea or defence, that it was what is here called a preliminary or dilatory defence, using the words " preliminary and dilatory " as synonymous. I do not think that the Act of Parliament intended that those words should at all be considered as having the same sense.

My Lords, it was suggested before the Committee, that, by the course of proceeding below, the party might have \* pre- \* 292 judiced the objection ; but the Committee did not think it right to trouble the House on that part of the argument, and desired only that the case should be argued before your Lordships on the character of that defence or plea ; whether it was to be considered as a dilatory plea, and whether, therefore, the appeal was taken away without the leave of the Court, under the 5th Section of 6 Geo. IV. c. 120. I consider the question before your Lordships to be, whether or not, under the 5th section of the Statute, to which I have referred, this is to be considered as a dilatory defence, the decision on which, therefore, could not be the subject of appeal without the leave of the Court. I humbly submit to your Lordships that this is not a dilatory defence ; that it is not within that section, and that it is competent to the party to present his appeal to this House. Upon the hearing of that appeal, of necessity, much of what has been urged before your Lordships to-day will have to be considered. On the present occasion, I shall advise your Lordships that the petition praying that the appeal may be

dismissed as incompetent, ought itself to be dismissed, and I move your Lordships that that petition be dismissed accordingly.<sup>1</sup>

*Mr. Anderson.* — I hope your Lordships will give us the costs of this hearing.

THE LORD CHANCELLOR. — They must be reserved.

*Respondent's petition dismissed, and the costs reserved until the hearing of the appeal.*

1851. February 20, 24 ; June 2.

SAMUEL JAMES CAPPER and others, *Plaintiffs in error.*

THE EARL OF LINSEY, *Defendant in error.*

*Railway. Agreement. Notice.*

A, a landowner, through whose estate a part of a projected railway was to pass, became a party to a deed with the projectors of the railway, by which he covenanted to withdraw his opposition to their bill and to oppose a rival bill, and they covenanted to pay him a certain sum of money in case their bill should pass within six months from the date of the deed, or to pay him a different sum if the rival bill should pass within eighteen months from the date of the deed. It was then provided that, if the bill of these projectors should not be passed within six months from the date of the agreement, either party might put an end to the agreement by a notice. The deed then contained a covenant on the part of these projectors, by which they agreed, if the two companies should be amalgamated, to pay a certain sum within three months after such amalgamation. The deed was dated on the 16th of March, 1846. The two companies were amalgamated in June, 1846; but no bill ever passed at the instance of these projectors alone. In November, 1846, these projectors gave a notice to put an end to the agreement. A declared in covenant against these projectors on that clause of the deed by which he was to receive a sum of money within three months after the amalgamation of the companies. The defendants pleaded that their bill had never passed into a law, that at the end of six months they had given notice to put an end to the agreement, and that they had not taken the plaintiff's land : —

*Held*, that this plea was no answer to the action.<sup>2</sup>

<sup>1</sup> See *Fleming v. Newton*, 1 House of Lords Cases, 363, where it was held that an interdict, though in form *ad interim* only, must be treated as a formal judgment, and may be the subject of appeal to this House.

<sup>2</sup> See *Egerton v. Brownlow*, 4 House of Lords Cases, at pp. 32, 55.

THIS was a writ of error on a judgment of the Court of Exchequer Chamber in an action of covenant. The declaration stated that on the 16th of March, 1846, an agreement, indented, had been made between the plaintiff and the defendants, which recited that the plaintiff was possessed of certain lands in the county of Lincoln; that the defendants, being the members of a projected company, had \* given notice of an intention to apply to \* 294 Parliament for a bill to enable them to construct a railway from London to York, to be called "The Direct Northern Railway"; that the line of such railway would pass close to the plaintiff's mansion and through other portions of his estate, and that he had given notice of his intention to oppose the said bill; that another projected company had likewise given notice of an intention to apply to Parliament for a bill to make a railway, with certain branches, from London to York, to be called "The Great Northern Railway"; that the plaintiff, as a landowner, had agreed with the defendants to withdraw his opposition to the Direct Northern Railway, and to use his best endeavours to oppose the bill for the Great Northern Railway; in consideration of which promises the defendants agreed that, in case the bill for the Direct Northern Railway should, within six calendar months from the date of the agreement, pass into a law, they would pay the plaintiff 25,000*l.*, in compensation for the permanent injury to be occasioned to the mansion of the plaintiff and his estate by the said railway, namely, 20,000*l.* within three months, and the remaining 5,000*l.* within three years after the passing of the bill, provided that within the latter period they did not obtain a bill to make certain deviations required by the plaintiff. Many other covenants were then added, and the agreement went on thus;—that in case the bill for the Great Northern Railway should, within eighteen months from the date of the agreement, pass into a law, the Direct Northern Railway Company should, within three months after the passing of the said bill, and whether any deviation in the intended line of the proposed railway should be made or not, pay to the plaintiffs the sums following: if the railway should be made with a branch from Stamford, 15,000*l.*; if without such branch, 5,000*l.*; in full compensation, &c. That in \* the event of the last- \* 295 mentioned bill passing into a law, the plaintiff should use his best endeavours to obtain from the Great Northern Company the largest sum as compensation, and should pay over the same to

the Direct Northern Company. Provided that, if no Act of Parliament in favour of the Direct Northern Railway Company should be passed within six calendar months from the date of this agreement, it should be lawful for the plaintiff, and also for the defendants, or either of them, at any time thereafter, to put an end to the agreement by written notice; and on giving such notice, every thing in the agreement therein contained (except some provisions as to costs) should be "absolutely null and void, to all intents and purposes whatsoever, as fully as if these presents had never been executed." And lastly, that in case an amalgamation should be made of the said intended companies, then the amalgamated companies should, within three calendar months next after the same should have been established by an Act of the legislature, and without reference to any alteration or deviation in the line, pay unto the plaintiff in full, &c. if the railway of the amalgamated companies should follow the line of the intended Direct Northern Railway, 25,000*l.*, subject to the same conditions as before; if it followed the intended line of the Great Northern Railway, with a branch to Stamford, 19,000*l.*, or without such branch, 6,000*l.* The declaration then alleged that, whilst the agreement remained in force, namely, on the 26th of June, 1846, the amalgamation of the two companies took place, and was established by an Act of the legislature; that the railway followed the line of the Great Northern Railway, without the branch to Stamford; whereupon the plaintiff claimed the sum of 6,000*l.* under the agreement.

The defendants pleaded that no Act of Parliament was made in favour of the Direct Northern Railway Company  
 \* 296 \* within six months of the date of the agreement, and that they did, on the 23d of November, 1846, according to the provisions in the agreement, give the plaintiff a notice in writing to put an end to the agreement, at which time no part of the line of railway had been made on the estate of the plaintiff, nor had his lands been taken by the amalgamated companies.

There was a general demurrer to this plea, and the defendants joined in demurrer.

The case was argued in the Court of Exchequer before Barons Alderson, Rolfe, and Platt, who held the plea to be an answer to the action, and judgment was given for the defendants.<sup>1</sup> The case was taken to the Exchequer Chamber, and there argued before

<sup>1</sup> 1 Exch. Rep. 579.

Justices Patteson, Coleridge, Coltman, Maule, Williams, Cresswell, and Erle, by whom the judgment of the Court of Exchequer was reversed.<sup>1</sup> The present writ of error was then brought to this House.

The Judges were summoned, and Baron Parke, Mr. Justice Patteson, Mr. Justice Maule, Mr. Justice Coleridge, Mr. Justice Erle, Mr. Justice Williams, Mr. Justice Talfourd, and Baron Martin attended the House.

*Sir F. Kelly* and *Mr. Stuart Wortley* (*Mr. Phipson* was with them) for the plaintiffs in error. — The question here relates to the construction of a clause in an agreement, and to the effect which that clause is to produce on the happening of a certain event. That event was the passing, within a limited period, of an Act to authorise the Direct Northern Railway Company to make a railway from London to York. That Act has not passed. On the determination of that event, the defendants had a \* right \* 297 to put an end to the agreement, by giving notice. They did give the notice; after the giving of which, according to the terms of that agreement itself, the agreement was to become null and void. Yet it is contended that that agreement still subsists. The argument for its continued subsistence depends on a particular exception contained in a proviso; but that proviso is itself disposed of by the effect of the notice, which operated as a general termination of the agreement. In the Court of Exchequer, one of the learned Barons asked whether there was any thing stated as to the length of time which might elapse before the earl's right to make this demand was finally extinguished. There is no way to get rid of the difficulty suggested by that question. If, within some months after the agreement had been put an end to, the additional clause now sued on could be enforced, because there had been an amalgamation of the two companies, it could be enforced for some years, or for any number of years; for there is no limit to the period within which the amalgamation of the companies might not revive the dead agreement.

In the Court of Exchequer Chamber, the arrangement of the provisoes in the deed was relied on; but surely, if a man makes three distinct and independent covenants, and an action is brought for the breach of any one of them, it cannot matter in what ar-

<sup>1</sup> 2 Exch. Rep. 801.



rangement they are placed, provided the deed which contains them is at an end. The covenant alleged to be broken may be a separate and independent covenant ; but if the whole deed is put an end to by the notice, the right to give which is expressly reserved, no one covenant in it, whether independent or not, can continue to subsist, and the part of the agreement where this right to give the notice is reserved cannot be a matter of importance. The

language of the deed clearly shows that, in the event of a  
 \* 298 notice being given after the bill for \* the Direct Northern Railway has failed to pass, the deed itself becomes void.

*Mr. Turner* and *Mr. J. Bailey* for the defendant in error. — The fallacy of the argument on the other side lies in treating this contract as if it was a mere contract for the purchase of lands. It is not so ; it is a contract for the purchase of the earl's right, as a landowner, to oppose the Direct Northern Railway, or to concur with the Direct Northern Company in opposing the scheme of the Great Northern Company. The consideration for the sale of his right is to be found in the covenants contained in the deed. The amount of the money to be paid is to depend on various circumstances. In one set of circumstances a larger, in another a smaller, sum is to be payable. The agreement goes on to suppose that, in spite of the opposition of the Direct Northern Company and of the earl, the bill of the Great Northern Company may pass into a law, in which event a different sum is to become payable ; and then comes the supposition that the two companies may be amalgamated. In that event, one of two rates of compensation on the occurrence of one of two states of circumstances is provided for. The provision for the determination of this agreement affects the rights of the parties on the happening of one of the several events mentioned in the agreement, but it does not touch those rights in relation to all of them. It could not ; the earl's title to oppose the amalgamated companies remained after all hope of passing the Direct Northern bill had been given up. The contract was one of purchase and sale ; but the subject matter was a right of opposition, or concurrence. By his opposition to the Great Northern, he put the Direct Northern Company in a position to compel  
 \* 299 an amalgamation. That amalgamation has \* taken place ; the Direct Northern Company has received the benefit of the exercise of this right, and now seeks to avoid paying for it.

But to allow it to do so, would be to make the deed a one-sided agreement, which cannot be.

It may be said that it was open for the earl to oppose the bill of the amalgamated company after the agreement was put an end to ; but that is not so, for the Direct Northern Company forms part of the amalgamated company, and he had covenanted not to oppose that company, having sold his right to do so for the considerations contained in this agreement.

The whole contents of the agreement justify this construction. Suppose that, on the 17th of March, 1846, the day after the making of the agreement, the two companies had amalgamated, the clause which binds them to pay a certain sum on the happening of that event would have applied. That clause constitutes a present contract to pay. Suppose that three months after that time the Act had passed, establishing the amalgamated company, the money would have become payable to the earl before the 16th of September, 1846. But the right to determine the agreement never could arise till after that time, for no option of that sort is given till " six calendar months from the date of these presents."

The first branch of the agreement relates to the passing of the Direct Northern bill within six months. The power to put an end to the agreement only arises after that branch of the agreement has wholly come to an end. But if so, still, in the second place, the event of the Great Northern bill being passed within eighteen months of the date, is not thereby affected. All these covenants are independent of each other, and the failure of one does not occasion the failure of all. If this proviso had been intended to override \* all the covenants in the deed, it would \* 300 have been put after all ; instead of which, it is placed only after the first two, leaving the third, which is the one now under consideration, wholly unaffected. It is the reasonable construction of this deed to refer the proviso to the two covenants which depend on the will of the legislature, a matter not to be controlled by the parties, instead of applying it to that matter which depends on the will of the parties as well as of the legislature ; for the latter construction would enable the parties to defeat their own contract.

*Sir F. Kelly*, in reply. — The words in the contract are to be read according to their ordinary and natural signification, unless

that mode of reading them gives to them a construction which is contrary to common sense. If so, then the whole agreement comes to an end by the effect of the notice. The provisions relative to the passing of the Great Northern bill, and to the amalgamation, were to take effect if no notice was given ; but if the notice was given, then it was intended that that notice should override everything else, and should completely put an end to the agreement.

THE LORD CHANCELLOR (LORD TRURO) moved that the following question should be put to the Judges : —

“ To a declaration in the form set forth in the accompanying paper,<sup>1</sup> would a plea also in the form set forth in such paper be held in the courts of law a sufficient answer ? ”

The Judges requested time to consider the question.

\* 301 \* BARON PARKE now delivered the opinion of the Judges.

In answer to the question proposed by your Lordships, I have to state the unanimous opinion of the Judges, that the plea in the case supposed would be bad.

In the deed set out in the declaration referred to in the question, it appears that there were two different Acts of Parliament applied for, for making a railway from London to York, one for a railway to be called the Direct Northern, another the Great Northern Railway ; and the deed contains a bargain with the plaintiff, who is to petition Parliament against and oppose the latter bill, and support the former ; and, as a consideration for so doing, the defendants, the provisional directors of the intended Direct Northern Railway, covenant to pay certain sums and give certain benefits to the plaintiff. These benefits vary, and the deed provides for three cases : —

First, the passing of the Direct Northern Railway bill in six calendar months.

Second, the passing of the Great Northern Railway bill before the end of eighteen calendar months.

Third, the amalgamation of the two, and the establishing of the amalgamated companies by Act of Parliament.

In the first event, 25,000*l.* are to be paid, and many other covenants are to be performed.

<sup>1</sup> The paper handed to the Judges contained the declaration and plea set forth at length.

In the second, the sums of 15,000*l.* or 5000*l.* are to be paid, and other stipulations performed.

In the third, 25,000*l.*, or 19,000*l.*, or 6000*l.* are to be paid, according as the line of the amalgamated company should follow the intended line of the Direct Northern, or of the Great Northern, with a particular branch, or without it. And the last contingency is averred in the declaration to have taken place; and the plaintiff seeks to recover \* the sum of 6000*l.*, stipulated in \*302 that event to be paid. The plaintiff's costs were at all events to be paid. It appears from the declaration, that in the deed there is this provision: "Provided always, and it was expressly agreed and declared, that if the Act of Parliament authorising the Direct Northern Railway to make the said intended railway from London to York should not be passed within six calendar months from the date of the deed, it should be lawful for the plaintiff, his heirs and assigns, at any time thereafter, to determine and put an end to the agreement, by a notice; after which notice, that agreement, and any article and thing therein contained (except the proviso and the covenant in relation to the payment of the plaintiff's costs), should be null and void, to all intents and purposes, as fully as if the agreement had never been executed"; and then follows another proviso in a similar form, allowing the defendants to determine the agreement in the same manner; after which the agreement, and everything therein contained, except that and the preceding proviso, and the covenants as to the costs, should be absolutely null and void in like manner. Then follows the provision for the case of amalgamation, on which the question depends: "And, lastly," — which, referring to the antecedent words, means, "Provided always, and it was thereby expressly agreed and declared lastly," — "that in case, either by an agreement made between the provisional directors of the said intended Direct Northern Railway Company and of the said intended Great Northern Railway Company, or in consequence of the decision or recommendation of a committee of the House of Commons or otherwise, an amalgamation should be made of the said intended companies and railways, then and in such case the said amalgamated companies should, within three calendar months next after the same should have been established by an Act of the legislature, \* and without reference to any alteration or \*303 deviation made or to be made of the line of railway, pay

one of the sums before mentioned, and then the several covenants and agreements concerning the purchase and taking of additional land, and the resale of land to the plaintiff, the making deviations and maintaining viaducts, and all other covenants on the part of the intended Direct Northern Railway Company, as far as the same should be applicable, should be performed by the amalgamated companies, and should be embodied in a deed to be executed by the amalgamated company."

The plea avers that no Act of Parliament, authorising the said Direct Northern Railway Company to make the said intended railway from London to York, passed within six calendar months from the date of the agreement, and that the defendants did thereupon, on the 23d November, 1846, in pursuance of the proviso, give a notice to determine and put an end to the agreement, and that no part of the plaintiff's said estate had then been taken or used by the amalgamated company, or any injury been then done to it: to which plea there is a demurrer; and the question referred to her Majesty's Judges is, the sufficiency of the plea.

It is impossible to deny, that the parties meant the defendants to be bound, under some circumstances, to pay the stipulated sums, if an amalgamation should be made of the two companies, and an Act passed to effect it, though neither the Direct Northern nor Great Northern Act should pass; for they are to pay, in case an amalgamation should take place by agreement of the provisional directors of the two companies, or by a recommendation of a committee of the House of Commons, evidently meaning a committee sitting upon either bill before it passed into a law.

\* 304     \* There being therefore clearly a clause creating an obligation to this effect, the question is, whether it was put an end to by a notice under the circumstances stated in the plea?

The question may be considered as if this clause formed a part of the provisos, one or both, or was collateral to them.

If the former be the case, and we think it is, the plea seems to us to be insufficient.

The part of the deed following the words "and lastly" may not be a qualification of the first proviso giving the option to the plaintiff, because there is nothing in the least repugnant or inconsistent in allowing the plaintiff to put an end to the obligation of covenants which are intended to be performed for his benefit, as these are, which are to operate in the case of amalgamation, as

well as the others. It is by no means unreasonable that the plaintiff should be allowed, if he cannot get the greatest advantages which he stipulates for, which he contemplated to obtain by the passing of the Direct Northern Company's Act in six months, to get rid of the agreement altogether, and insist on his legal rights, independently of contract. But there is much more difficulty in allowing the defendants, provided the Direct Northern bill does not pass, to rid themselves of all liability to perform covenants which are clearly meant to operate, as these were, though the Direct Northern Act should not pass.

It is not impossible that parties should so stipulate; and in the deed there is clearly a power given to the defendants to determine the covenants as to the Great Northern, though they are unconnected with those relative to the Direct Northern; for if the Direct Northern does not pass in six months, they may determine the obligation to pay, if the Great Northern passes in eighteen. But when we find \* this, which is a proviso, and \*305 placed in juxtaposition with that enabling the defendants to determine the contract, and connected with it, we think we ought to construe it as qualifying the former proviso. And, so construed, the meaning is, that, provided the Direct Northern Act should not pass in six months, the defendants may determine the contract, provided that if the companies are amalgamated, then they shall not, but shall be bound to pay the substituted contingent sums. It is said, however, that this construction is inadmissible, because there is no limit of time within which the amalgamation is to take place, so that the right to determine the contract at the end of six months is to depend on a subsequent event to happen at an indefinite time. It is argued that it would be inconsistent to say that the defendants might determine the contract at the end of six months, yet they should not do so if ten years afterwards another event should occur. And this is a reason for qualifying the defendants' right to some extent, and for holding that the defendants may determine the contract at or after the end of six months, in case their Act should not in the mean time pass; but in case an amalgamation should have taken place and been established by Act of Parliament, whilst the contract remained undetermined, then the covenants depending on amalgamation should be performed. This construction renders the whole intelligible and consistent; and, supposing this to be the true con-

struction of the instrument, the averment in the declaration, that the amalgamation of the companies took place and was established by an Act of the legislature whilst the agreement remained in full force, sufficiently shows that it was made before the defendants gave notice to determine.

If, in the second place, these stipulations should not be considered as part of the proviso immediately preceding, but as introduced in a prior or subsequent part of the deeds, it seems to us that the plea is equally bad.

\* 306     \* The proviso is, as has been said, perfectly reasonable on the part of the plaintiff. It is unnecessary indeed with respect to all the covenants depending on the Direct Northern Railway Company obtaining the Act, because they are already made contingent on the Act being obtained in six months ; but with respect to those depending on the Act for the Great Northern Company passing in eighteen months, the proviso is not unnecessary, but it is by no means unreasonable, for the covenants are for the benefit of the plaintiff ; nor would it be inconsistent or unreasonable to allow, as an equivalent to giving the option to the plaintiff, also to give the option to the defendants to determine all their covenants with respect to the Great Northern, so that the defendants might under their agreement, if the Direct Northern Act did not pass within six months, have freed themselves from the obligation to pay the sums and to perform the covenants on their part dependent on the passing of the Great Northern Company's Act in eighteen calendar months. And this appears to have been permitted by the deed, which is so worded as to allow the option to both parties, as to the covenant with respect to the Great Northern ; but then it is clear to us that they must have executed that option before the actual breach of the covenants ; for after the covenants have been actually broken by nonpayment of sums payable pursuant to them, or nonperformance of other covenants, whereby a cause of action actually occurred, as here, it would be unreasonable and inconsistent to allow the defendants a power to discharge themselves by a notice to determine.

It would be as much as to say this, that though the defendants have actually broken their covenants subsisting at the time, and become liable to pay a large sum of money, or large damages, or both, yet they should not be recovered if the defendants chose to give notice to determine the contract.

\* 307      \* If then the covenants dependent on the amalgamation had been wholly collateral to the proviso, and not a qualification of it, and had been inserted as an independent part of the deed, we think this plea would be bad, because it is not stated, nor does it appear, that the notice was given before the breach of the covenants declared upon for the nonpayment of 6000*l*. This sum was to be paid in three months after the Act passed, and therefore at the end of three months there was a breach. The right to payment does not depend upon the fact of making a part of the railway by the amalgamated company on the plaintiff's estate, or taking or using or doing any injury to the plaintiff's land ; the right to it depends simply on the effluxion of three months' time after the Amalgamation Act. No doubt no averment could have been made on the plea to obviate the last objection, as the notice was probably not given till the 23d November, and the Amalgamation Act passed in June.

We are therefore of opinion that, whether we consider the clause in question as a proviso qualifying the preceding proviso, or as a collateral proviso or covenant, the plea is bad.

THE LORD CHANCELLOR said that their Lordships were much indebted to the learned Judges for the assistance which they had rendered in this case. He moved that their opinion should be printed.

LORD BROUGHAM thought that, after the able opinion of the Judges, with which he entirely agreed, the House could entertain no doubt upon the subject, and he should therefore move that judgment be given for the defendant in error.

THE LORD CHANCELLOR concurred with his noble and learned friend.

*Judgment of the Court below affirmed.*



DUNCAN CAMPBELL PATERSON, *Appellant*.

ELIZABETH R. PATERSON, his Wife, *Respondent*.

*Divorce. Practice. Costs.*

Neglect, silence, shunning the wife's company, and declarations by the husband that he will never cohabit with her, do not constitute that "cruelty and maltreatment" in respect of which the law will grant to the wife a divorce *a mensâ et thoro*.

Where, in a case of this sort, the Court of Session had pronounced for a divorce, the Lords reversed the Interlocutor.

Actual personal violence, or the immediate menace of it, is not the only ground of maltreatment in respect of which such a divorce will be granted.

*Quære*, whether constant revilings and accusations of all sorts of crimes made, and falsely made, before friends and servants, would constitute a ground for such a divorce.

The general principle of the law as to divorce *a mensâ et thoro* is the same in England and Scotland.

But it seems that a special principle exists in the law of Scotland, which permits a divorce for a wilful desertion continued for four years. See post, pp. 315, 316.

In a suit for a divorce *a mensâ et thoro* the wife obtained judgment in the Court below, with costs. That judgment was reversed by the Lords, on the ground that the remedy sought was not the proper one; but the Interlocutor was allowed to stand so far as it gave the wife the costs in the Court below.

The wife, however, was not allowed the costs of the appeal. *Quære*.

THIS was an appeal against a decree of the Court of Session, pronounced in a suit instituted by the wife for separation and alimony. The summons set forth a marriage between the parties on the 8th of July, 1843. The appellant was a Scotchman, and his residence was at Lochgair House, Argyleshire; the respondent was an Irish lady, and their marriage took place at St. John's Church, at Paddington. The summons charged that the husband, "instead of behaving himself towards the pursuer with tenderness

\* 309 and humanity, conducted himself towards her in a \* cruel manner, so that her life had been rendered a burden to her, and might have been endangered if she had continued to live with him; that his whole conduct had been influenced by a desire to expel her from his house; that in particular he had never discharged the duties of the marriage-bed, or of a husband to a wife;

and since about six weeks after the date of the celebration of the marriage, he ceased to hold any intercourse with her, did not speak to her, and never entered her apartment, but treated her in the most contemptuous and insolent manner, and did so openly in the presence of servants and others." The summons alleged that the appellant avoided his wife's society, and would only walk with and speak to his sister, and several other matters of the same sort, and went on to say, that "he has declared himself separated from his wife, and that he never will again return to her." It then set forth, that in consequence of this kind of treatment she quitted his house on the 6th of April, 1844, and it concluded by praying for a sentence of divorce *a mensâ et thoro*, with a suitable allowance.

The defender pleaded "that this was an untenable action," and in his defence alleged that, "as to occupying separate apartments, this is a matter with which the Court cannot directly or indirectly interfere." He positively denied several of the statements contained in the pursuer's summons, and then insisted that the action was irrelevant, "for there is no allegation of personal violence either used or so much as threatened."

The record having been closed, the case came on before Lord Cunninghame, as Lord Ordinary, and on the 25th of June, 1845, his Lordship pronounced a decree dismissing the action. In the "Note" appended to the judgment, Lord Cunninghame referred to the English authorities as collected in Burn's Ecclesiastical Law, by Phillimore, \* Vol. II. p. 503, and to the \* 310 Scotch cases noticed by Mr. Fergusson in his book on Consistorial Law, as showing decisively that such an action was not maintainable, and he added, "If this point had occurred now for the first time, or if it were competent for a single judge to question so many high authorities as are arrayed in favor of extreme marital rights, the Lord Ordinary would have greatly doubted the justice, and even the policy, of permitting any husband to wound and outrage the feelings of his wife by every species of insult short of personal violence, and to persevere in this conduct for a continued tract of time (it may be for a lifetime, on the defender's plea) without redress"; but he considered himself bound by the authorities, and looked on the question "as no longer open for discussion."

A reclaiming note against this interlocutor was presented by the

pursuer to the Lords of the First Division, who, on the 13th of January, 1846, recalled the Lord Ordinary's interlocutor, and ordered the pursuer to give in a special condescendence of facts. This was done; the revised condescendence repeating, but in more detail, all the allegations of the bill, and referring to certain letters of the defender, in which he declared "the utter impossibility of my ever returning to her apartment." The defender still insisted that the action was incompetent. The case was, however, admitted to proof, and afterwards reported on by the Lord

Ordinary,<sup>1</sup> and on the 24th of January, 1849, the Lords  
 \* 311 \* of the First Division, having considered this report and the proofs, and heard counsel for both parties, pronounced a decree for separation *a mensâ et thoro*, and for alimony. The judgment was not unanimous, Lord Fullerton differing from the rest of the Judges as to the sufficiency of proof of the allegations contained in the summons. His Lordship said, "The pursuer has not made out in evidence any case which would warrant us to pronounce a decree of separation." He added, that "the Court must not rashly interfere to sever the union unless the pursuer can make out a case of personal violence, or of positive insult, a kind of treatment which, though moral rather than physical, a Court can construe as equivalent to personal violence. Now in this proof I can see nothing of the kind. . . . All that is proved is that he abstained from conjugal intercourse; that he abstained even from conversation with her, and that he did not wish her to cultivate the society of her neighbors. Now are these enough? Are these to be held such personal insults, such open outrages to her feelings, as to be equivalent in a court of law to personal violence, or a case of the kind? I think not."

<sup>1</sup> Lord Cunninghame, on reporting on the case on the 18th of March, 1848, said: "Whatever may be the law of England, it has long been established with us, that desertion or non-adherence by either of the spouses to the other, is a high crime and misdemeanour in matrimonial law. It is, in fact, a delict, in which, if the guilty party persists for four years, his crime is placed in the same category with adultery, and entitles the injured party to the last and highest remedy competent to a married party against an offending spouse. But if so, when the offence of non-adherence is commenced, and when it is proved under the hand of a defender himself, that he is never to adhere, from that time and thenceforward, it is apprehended that the wife is not bound to reside in the house with her husband, slighted and insulted by him and his family every hour. And hence, the husband is bound to provide suitable aliment for the wife in a separate residence."

The appeal was brought against the two decrees of the 13th of June, 1846, and the 24th of January, 1849.

*Mr. Rolt* and *Dr. Harding* for the appellant. — There is not sufficient in this case to warrant a judicial sentence for a divorce.

LORD BROUGHAM. — That is the difficulty which has struck my mind. If every allegation in the summons \* could be \* 312 proved twenty times over, I do not think that there would be any thing to justify a divorce. I should like to hear something from the other side on this point.

*Mr. Turner* and *Mr. Anderson* for the respondent. — The law of Scotland differs very much from the law of England in this respect. Our law is, as Lord Jeffrey said in his judgment in this case, much more strict than the law of Scotland.

LORD BROUGHAM. — There is not, as I think, any difference between the two laws with regard to a case of this kind, though there is so with respect to divorce *a vinculo*. As to that, by the law of Scotland marriage is a civil contract, dissoluble by a Court of Justice, whereas, by the law of England, it is indissoluble except by Parliament.

There is one other difference, and that difference justifies the decree in this case. In Scotland there may be a separation where conduct of the sort proved here has taken place, and where there is no reasonable expectation that the parties can live together, still more where one of them, as here the husband, declares that he or she will not fulfil the duties of a spouse. Where that declaration is persisted in for a certain period, the Scotch law treats the marriage as a contract that can never be performed, and allows of a divorce *a mensâ et thoro*. A constant system of annoyance, such as has been practised here, rendering it impossible that the parties should live together, will also justify a demand for such a divorce. This is a Scotch contract, and must therefore be governed by Scotch law. The case of *Gordon v. Gordon*<sup>1</sup> shows that, under circumstances like the present, the Scotch Courts will entertain a suit for a divorce. *Letham v. Letham*<sup>2</sup> is an authority to the same effect. There a \* woman was brought by the \* 313 husband into the house where the wife resided, and was delivered of a child. No violence of a personal kind was com-

<sup>1</sup> Morison, Dict. Vol. VII. p. 5902.

<sup>2</sup> 2 Shaw & Dunlop, 284.

mitted by the husband, and none was threatened; but the Court felt that, under such circumstances, a divorce must be allowed. Then came the case of *Shand v. Shand*, where the Lord Justice Clerk thus stated the principles of the law of Scotland: <sup>1</sup> "I can never accede to the proposition that the only ground of matrimonial separation must rest on personal violence. That is not the law of the country, and I will venture to say it is not the law of any civilized land. A train of maltreatment may occur in the married state, to be viewed and weighed according to the status of the parties in society, perfectly sufficient to found a claim of judicial separation, without an appeal to personal violence." This was in answer to what had fallen, in his judgment in that case, from Lord Cringletie, who, in reply, observed, "I did not maintain that nothing but personal violence could make a relevant case of separation. What I said was, that nothing relevant was stated here, and that the general allegations were [*qu. not*] inconsistent with the absence of personal violence."

LORD BROUGHAM. — Suppose a man constantly called his virtuous wife a strumpet, saying so not to herself alone, but before everybody. As far as suffering was concerned, he had better kick her; but would such conduct give her a right to sue for a divorce?

It might, for Bankton says,<sup>2</sup> "There may be a divorce on account of the husband's cruelty or maltreatment." There has been maltreatment here. Besides, in this case, there has also been that negligence and that desertion which amount, in fact, to a complete abandonment of the conjugal duties. Fergus-

\* 314 son, in his work on \* Consistorial Law, thus sums up the law of Scotland on this subject: <sup>3</sup> "If these mutual engagements are broken by personal violence and barbarous treatment, committed by either spouse against the other, the action then lies *propter savitiam*." He will not go through the instances. "For with little or no corporal injury inflicted by force, in the upper classes especially, the tyrannical conduct of the husband has, at all times, in some though rare instances, been displayed to such excess even by mental annoyance, threats, unjust accusations, restraints, and privations, as to authorize the injured wife to have recourse for redress to the competent tribunal in the consistorial

<sup>1</sup> 10 Shaw & Dunlop, 384.

<sup>2</sup> Ferg. Const. Law of Scotland, p. 182.

<sup>3</sup> Bk. I. tit 5, § 132.

department.” Then comes the case of *Murray v. Murray*,<sup>1</sup> which establishes, most decisively, that neither adultery nor personal violence is absolutely necessary to constitute a ground for a divorce, but that relief may be given in that form for other causes. Mr. Fergusson thus sums up the facts and law of the case. He says: “From a careful perusal of this case, it does not appear that, in this case, any one act of personal violence, however trifling, was established against the defender, during their cohabitation for three years and a half, commencing at the date of the marriage, and extending downwards to that of the action which produced the decree of separation. But the husband, during all this space of time, seems to have been himself possessed, and unceasingly to have tormented his wife, a lady of high breeding and family, and of unblemished character, with causeless but incurable jealousy, which manifested itself in accusations and inquiries of the most injurious description; when prosecuted, he, with professions of penitence and affection, instituted a counter action of adherence against \* the lady. But, after long and learned \* 315 debates in both of these cases, a decree, in terms of the libel, was pronounced on her action against him; and she was *simpliciter* assolized, with expenses from his counter process, by the final judgments.” That case is exactly one of the kind mentioned. There was no adultery imputed, there was no violence charged, but there was that which was destroying the comfort and the health of the wife, that breaking of her heart by continued unkindness; a course of conduct that rendered the performance of the duties of the husband and wife impossible, and which, therefore, the Court thought sufficient to justify the divorce. That case alone would be sufficient to show that, by the law of Scotland, the remedy granted in this instance was correct. Erskine, in his *Principles of the Law of Scotland*, speaks in more than one place of the separation *a mensâ et thoro* on account of other causes besides those of adultery and violence. Thus he says:<sup>2</sup> “By our law neither adultery nor wilful desertion is a ground which must necessarily dissolve marriage”; as if desertion might dissolve it, though not necessarily so; “they are only handles which the injured party may take hold of to be free.” And again he says:<sup>3</sup>

<sup>1</sup> Referred to Ferg. Const. Law, 184, and the facts stated in the Consistorial Records of 1714, pp. 68 to 224.

<sup>2</sup> Bk. I. tit. 6, § 23.

<sup>3</sup> Bk. I. tit. 6, § 20.

"By the law of Scotland, agreeable to the rules of our holy religion, marriage cannot be dissolved till death, except by divorce, proceeding either upon the head of adultery, Matth. xix. 8, 9; Mark x. 11, or of wilful desertion, 1 Cor. vii. 15." In the same book he speaks of a decree for a divorce on the ground of desertion for four years together,<sup>1</sup> and in another part he thus treats of the matter:<sup>2</sup> "If the husband should either withdraw from his wife or turn her out of doors, or, if continuing in family with her, he should by severe treatment endanger her life,

\* 316 \* the Commissioners will authorise a separation *a mens et thoro*, and give a separate alimony to the wife, suitable to her husband's estate, from the time of such separation until either a reconciliation or a sentence of divorce." In the same manner Mr. Bell, in his "Principles,"<sup>3</sup> treats of judicial separation as proceeding on satisfactory evidence of continued annoyances wearing out and exhausting the party. (Mr. Rolt referred to the case of *Colquhoun v. Colquhoun*.<sup>4</sup>) That case cannot be supported on any principle. It goes the extraordinary length of declaring that a man may take another house, different from that in which he resides, and make his wife live there. In Bell's Principles<sup>5</sup> that case is thus spoken of: "But this is not a settled point, and the power is very questionable." Here, however, the case is still stronger; for in addition to studied neglect and disrespect before all the family and servants, there is in the correspondence [he referred to it] the distinct declaration of the appellant that he will not cohabit with his wife.

LORD BROUGHAM. — Nothing could give me a more contemptible

<sup>1</sup> Principles, Bk. I. tit. 6, § 24.

<sup>2</sup> S. 1540.

<sup>3</sup> Principles, Bk. I. tit. 6, § 13.

<sup>4</sup> March 7, 1804, Morison, Dict. Vol. XV. *vide* Husband and Wife, append. part i. case 5: —

*Colquhoun v. Colquhoun*. — Proceeding by a wife to restrain her husband from forcing her to leave her husband's house and live in a separate house which had been provided for her.

The majority of the Judges said: "It is only where the wife has suffered personal injury that the Courts of Law will interfere with the husband in the regulation of his household. The more delicate, though not less acute, sufferings of the mind come not within the cognizance of any earthly tribunal. By the law of Scotland no other remedy is pointed out for this case but a claim for alimony and the right of suing for adherence, which, after a certain period, will terminate in a divorce for wilful desertion."

<sup>5</sup> S. 1542.

\*idea of the man. But suppose a man to say, when he \* 317 wants a settlement of his pecuniary difficulties, that he is fond of a woman, and when he has got the settlement, suppose him to insult her, and to treat her with the greatest neglect, can you say that that will be ground for a divorce *a mensâ et thoro*?

It would be so according to the law of Scotland, though it might not perhaps be so according to the law of England. Here we have to do with the Scotch law, which allows a divorce of this kind for other causes besides those of personal violence or those in which there have been threats of personal violence. Supposing, therefore, that the law of England will not grant (which, however, is not admitted to be the case) any divorce to a wife except in these two cases, still it is contended that no such restriction exists in the law of Scotland; but that, where there has been, as in this case, great neglect, a preference of the sister's society to the wife's, disrespectful treatment of the wife before the servants, and finally, the distinct and express declaration, more than once repeated, that the husband will not live with the wife, or treat her as a husband is bound to do, the law of Scotland will grant a divorce *a mensâ et thoro*, and will assign the wife alimony; and therefore the decree in the present case must be sustained.

LORD BROUGHAM. — My Lords, in this case I wish very much to have the benefit of hearing Dr. Harding upon one point. I am quite clear that this decree of the Court below cannot stand in its present form. I have no doubt whatever about that, but it may be well to hear Dr. Harding upon the point I shall mention.

This is a very important case in point of principle; and although I shall, as at present advised, move your Lordships

\* to reverse the interlocutor complained of, yet I am by no \* 318 means prepared to set up the interlocutor of Lord Cunningham, dismissing the suit upon the ground that by the law of Scotland, as well as by the law of England, the ground of the remedy is confined to a case of personal violence. That is not the opinion that I have either of the law of Scotland or of the law of England. I think it must be such maltreatment generally, such cruelty of conduct, not confined to mere battery or assault, or threats of battery or assault, but grossly cruel conduct and maltreatment, and which may, after all, in the cases I have put, be confined merely to words, may rest in parole, but yet may



make it utterly impossible for any woman, having the feelings of a woman, to live with her husband.

I must, therefore, take care that your Lordships do not, in reversing the ultimate decision of the Court below, *set up* the erroneous interlocutor of the Lord Ordinary. I shall, when I move the judgment, state the grounds of my opinion ; and I do not now feel that it will be necessary to call upon Mr. Rolt for a reply. But in the mean time, I should wish to have the benefit of Dr. Harding's observations, confined to one point, namely, how far the law of England is, as I have stated my impression of it, not strictly confined to the case of actual corporal violence, or threats of corporal violence, but extending to cases of other maltreatment of so gross and grievous a nature as to make it impossible for any woman to live with her husband. I do not know that the husband might not have the same remedy reciprocally against the wife ; but into that question it is unnecessary now to go.

*Dr. Harding.* — I am afraid, my Lord, that I shall be hardly able to establish the point that bodily violence is indispensably necessary in England to make a ground for divorce.

\* 319 \* LORD BROUGHAM. — Then I shall not trouble you. If you were able to establish that point, it would lead me to reconsider Lord Cunninghame's interlocutor. I am convinced that the law is nearly, if not altogether, the same in the two countries. We have not gone so far here in any one case as they have gone in one or two cases in Scotland ; but I am confident, if you examine it, there will not be found any very material difference between the two systems.

*Dr. Harding.* — Danger to life and health may be a ground in Doctors' Commons: health and life may be endangered without bodily violence.

LORD BROUGHAM. — Would not you go a step further and say, suppose a man were constantly charging his wife with divers offences against morality ; suppose even worse than that, he charged her with theft, with attempts to murder him, with adultery, with fornication, in short, with every sort of criminal as well as grossly immoral conduct, and that there was not the shadow of a foundation for those charges, that they were only the result of a determination to wear her out and to "break her heart," according to the expressive phrase used by Mr. Turner (but which I do not think applies in this case), accompanied with declarations that

he would see the end of her, not by killing her, but by making her a broken-hearted woman, should you say that there would be ground for a divorce of this sort? I should say that it would be utterly impossible for a woman to live with a man under such circumstances, for no promise of amendment could be at all relied upon by your Lordships or any Court in such a case. I admit, however, there is no case, as far as I know, that comes up to this point. Then as to costs; it is not in Doctors' Commons the same when the wife sues as when the husband sues; for in the latter case he must pay the expenses of the wife's defence and also of the wife's appeal against the judgment.

\* *Mr. Anderson.* — Perhaps your Lordship will say nothing \* 320 upon that point now, because there may be a question here, as to whether or no (as in several cases the Courts have held) there is any thing like a probable case.

LORD BROUGHAM. — Is that the rule in Scotland?

*Mr. Anderson.* — Yes, my Lord.

LORD BROUGHAM. — I will save that point.

On the following morning Dr. Harding appeared at the bar of the House, and said: There is no code, or canon, or statute regulating the law of separation by reason of cruelty. That law is only to be collected from the decisions. The infliction, or immediate menace or apprehension of bodily violence, or danger to life, limb, or health, at least what would amount to an assault at law, has always been held necessary to establish a case of cruelty by the English Ecclesiastical Courts, and it is said<sup>1</sup> to be their "duty and inclination to keep the rule extremely strict." This is the result to be collected from the judicial statements made in the cases of *Evans v. Evans*;<sup>2</sup> *Oliver v. Oliver*;<sup>3</sup> *Harris v. Harris*,<sup>4</sup> where the phrase used is "something which renders cohabitation unsafe"; *Westmeath v. Westmeath*,<sup>5</sup> where the ground of such a divorce is stated to be "the reasonable apprehension of personal injury," and *Neeld v. Neeld*,<sup>6</sup> where it was held that an interdict of intercourse with her family is not cruelty to a wife, and where the Judge said, "Short of personal violence, or reasonable apprehension of it, I have no authority to interfere." The proof in the

<sup>1</sup> 1 Haggard Cons. Rep. at p. 37.

<sup>2</sup> 2 Haggard Eccl. Rep. Suppl. at p. 72.

<sup>3</sup> 1 Haggard Cons. Rep. at pp. 37–39. <sup>4</sup> 4 Haggard Eccl. Rep. at pp. 269, 270.

<sup>5</sup> 1 Haggard Cons. Rep. at p. 364.

<sup>6</sup> 2 Haggard Cons. Rep. at p. 149; 2 Phillimore, 111.

present case does not in any way come up to any of the  
 \* 321 limits here \* assigned to the jurisdiction of the Court in granting a divorce.

LORD BROUGHAM. — My Lords, this case is one of considerable importance, and of a somewhat novel nature, either in Scotland or in this country. I therefore requested the learned civilian (Dr. Harding), who has just addressed your Lordships, to speak to one point, and he has been of great service to us in throwing light upon the state of the English law, particularly of the civil law administered in the Consistorial Courts. I shall postpone moving the judgment of the House until the close of the day.

The arguments in another case were then proceeded with, and at the close of the day —

LORD BROUGHAM said: My Lords, this case comes by appeal against two interlocutors of the Court of Session, one of which altered the interlocutor of the Lord Ordinary and remitted the case to him to proceed and take proof, he having decided against the relevancy of the summons and against going further, and having dismissed the suit. I shall presently state in what way I differ from the view taken by his Lordship. The other interlocutor is that which was pronounced by the Court, after the case had been remitted to the Lord Ordinary with instructions to proceed, and after the proofs had thereupon been taken by his Lordship and reported to the Court. The Court decreed for the remedy prayed, and not only ordered a separation *a mensâ et thoro*, in terms between the parties as prayed, but likewise postponed the consideration of the question of alimony to follow upon that decree of separation, until an account should have been taken of the means of the defender, the present appellant, to pay that alimony. These

two interlocutors are appealed from, and it is now for your  
 \* 322 Lordships, after having heard the \* case argued at the bar fully for the respondent, not so fully for the appellant, in consequence of my wishing to hear what could be said in support of the decision below, and after having had the assistance of the learned civilian, who also appeared for the appellant, on the bearing of the English law on questions of this kind, it is now for your Lordships finally to dispose of the case.

I agree with the learned Judges of the Court below, if on no other matter in the cause, at least in this, that the case is of a

somewhat novel description. I have never known, either in English or Scotch judicature, any one at all similar to it. I also agree with the learned Judges, that it presents features of a painful aspect, and shows, in a somewhat repulsive form, the conduct of one of the parties, in extenuation of which, however, there is not a little to be urged.

It appears that Mr. Paterson, having been laid under obligations to Mr. Russell of a pecuniary nature, had, in the course of the communications which took place in consequence of his embarrassments, become attached, or at least appeared to be attached, to Miss Elizabeth Russell, the daughter of his benefactor; that he proposed marriage to her, and having gained her affections, was accepted by the family as a husband; that the marriage was solemnized; that it was consummated, and that they lived together as man and wife for somewhere about four months. It appears that some degree of disgust, or at least great coldness almost amounting to a dislike, arose in the mind of the husband very soon after the marriage. If we take his own word for it, as given in a letter to his father-in-law, we find that he had, even before the marriage was solemnized, begun to entertain feelings towards his future wife very different from those with which he had presented himself before her when he sought her hand; that he looked upon the contemplated \*match as not \* 323 likely to give him happiness or even comfort, and that he nevertheless, instead of frankly disclosing the change which had thus taken place in his mind; instead of letting the father know that he no longer expected happiness from the connection which he had sought; instead of disclosing, too, that it could no longer conduce to the happiness of his wife; he kept all this to himself, and was married. In explanation of what cannot be justified, he says that he wished to see the father, but by accidental circumstances was prevented from obtaining an interview; as if there was no paper to be had upon which he could write, or as if it was a matter too delicate to be committed to paper, and which only could be communicated personally. He makes no effort to save this unfortunate lady from the misery of a connection which he knew must lead to no other result; the marriage is solemnized, and the parties cohabit for four months. Then begins a separation entirely from the society of his wife; then begins a correspondence with the father-in-law, in which he attempts to explain

his conduct; he further makes the assertion, that he can no longer endure his wife's society; avowing, without imputing any blame to her, that he will never again, on any account, be induced to cohabit with her, but must forever separate himself from her. He adds many other expressions respecting the misery which he feels, the state of low spirits, his mental depression, for which, though he possibly may be the object of pity, yet is he certainly greatly to blame, because he most imprudently brought his partner as well as himself into the misery resulting from this state; his only excuse being, that he was under pecuniary obligations to Mr. Russell, and did not like to interrupt an intercourse, which he found gainful, by breaking off the match, and in all probability, also, \*losing the source of those accommodations derived from the kindness of his wife's father.

Now all this may be accounted for, though it cannot be excused, by the peculiarity of the man's constitution, and his necessities at the time; but undoubtedly he alone is not the only victim of those circumstances and (to give it no harsher name) of his grossly imprudent conduct. She is the victim, also, to whom no blame whatever, even for indiscretion, can be imputed. She is the innocent sufferer in this case; and with respect to her, the feelings of the Court below appear to have been not unnaturally, I may say almost unavoidably, awakened. In those feelings I heartily concur. But, my Lords, a judge has no right to indulge his feelings; no right to entertain any feelings which can, in any the slightest degree, affect his own judgment. He must not feel for one party or the other, nor know any desire nor any sentiment, except a fixed resolution to administer justice, sternly and unbendingly, between the two; justice according to the stern and unbending letter of the law, whose organ he is.

If their Lordships in the Court below had thus viewed the nature of the judicial office, I do not think it possible that we should have read the opinion of three of the four learned Judges who have decided this cause, as we now read them; and I do not think it would have been possible to pronounce the second interlocutor now appealed from. Their speeches contain more than one example of the exaggerated language in which the facts of the case are stated. I need not recur to them. In one instance, a supposition is made, not borne out by any one part either of the proof or even of the allegations in the summons and condescend-

ence, clearly showing that the natural feelings of the very learned Judge carried him away in his comments upon the cause.

\* But I have now the task of dealing with the founda- \* 325  
tions upon which this judgment must rest, and of stating,  
with your Lordships' permission, what the law is, in order to show  
that the Court below has widely departed from an accurate view  
of it. Personal violence, as assault upon the person of the  
woman ; threats of violence, which induce the fear of immediate  
danger to her person ; constraint of her person ; maltreatment  
of her person, so as to injure her health, — these are, both by the  
law of Scotland and the law of England, sufficient grounds of  
divorce *a mensâ et thoro*. Furthermore, any conduct towards the  
wife which leads to any injury, either creating danger to her life  
or danger to her health, that, too, must be taken as regarded by  
the law of Scotland and by the law of England a sufficient ground  
of divorce. It is not true, as the learned Judges have stated in  
the Court below, that the law of England stops short at personal  
violence, and requires either actual injury to the person, or a  
threat of such injury, in order to constitute a ground of divorce.  
Although there be no actual violence offered, and no menace of  
violence held out, the wife may yet obtain a divorce from the bed  
and board of her husband, if he shall, by such conduct as places  
her life, or even only her health, in jeopardy, render it impossible  
for her safely to consort any longer with him in the marriage state.  
How far the Consistorial Courts of England could go beyond that,  
I am not prepared to say ; because, when I find it laid down by  
that most learned and eloquent judge, Sir William Scott, some-  
thing short of personal violence, — something short of even menace  
of such violence, — may be sufficient ground for divorce ; yet  
when he goes forward to state what cruelty short of that may be  
sufficient, he appears almost to consider that injury to the life or  
health, — in short, some grievous bodily injury, either in-  
flicted or immediately approaching \* from the party's con- \* 326  
duct, is necessary to sustain the divorce. For example, in  
*Evans v. Evans*,<sup>1</sup> he says : “ It is pleaded that, while Mrs. Evans  
was in a very weak and sickly state, Mr. Evans accustomed him-  
self, in the most unfeeling and cruel manner, to distress her and  
increase her pain, by making a violent noise with a hammer close  
to her. I had very great doubts,” he says, “ about admitting this

<sup>1</sup> 1 Haggard Cons. Rep. 69.

article. I admitted it upon an idea suggested naturally enough by the words, that this gentleman came, without any reason whatever, with a heavy, massive instrument, to make a loud noise quite close to the head of a very sickly and infirm person. I do not believe that it could have entered into the conception of the most ingenious person in this Court to have imagined that this meant Mr. Evans making a very slight noise only, by cracking almonds with a hammer in an adjoining room." And in another part of the case, the learned Judge says that, in all these instances (and the Court, he adds, has never yet gone beyond it), there has been an ingredient in the alleged cruelty, an actual danger to either life or health, or something which tended to endanger the health, as a parcel of the cruelty. He says, in page 37: "What is cruelty? In the present case, it is hardly necessary for me to define it; because the facts here complained of are such as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health and even the life of the party. I shall, therefore, decline the task of laying down a direct definition. This, however, must be understood, that it is the duty of courts, and consequently the inclination of courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. In a state of personal \* 327 danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary, both in commencement and in obligation; but what falls short of this is with great caution to be admitted. The rule of *per quod consortium amittitur* is but an inadequate test; for it still remains to be inquired what conduct ought to produce that effect, — whether the *consortium* is reasonably lost, and whether the party quitting has not too hastily abandoned the *consortium*? What merely wounds the mental feelings is in few cases to be admitted, when they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage state, undoubtedly; not innocent, surely, in any state of life; but still, they are not that cruelty against which the law can relieve."

"And if it be complained that, by this inactivity of the courts, much injustice may be suffered, and much misery produced, the answer is, that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no further; they cannot make men virtuous; and as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove." "In the older cases of this sort," he says, "which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It has been always jealous of the \*inconvenience of departing from it, and I have heard \*328 no one case cited in which the Court has granted a divorce without proof given of a reasonable apprehension of bodily hurt."

The cases to which I have been referred by the learning of Dr. Harding lead me to this general conclusion, that the matter rests now upon the decision, as far as the authorities go, in *Evans v. Evans*, and on that portion of it which I have now read. Negatively we may say there is no case which, in decision, goes further than Sir William Scott does there; but nevertheless, there is so much dictum, — there are so many opinions, or inclinations of opinion, ventilated, which have a tendency to go further, — that if a case were to arise, such as that which the ingenuity of some of the learned Judges in Scotland supposed, I have very little doubt that we should find the rule considerably extended; and that that which only now rests upon opinions, more or less distinctly expressed in the shape of dicta, would assume the form ultimately of decision; namely, that if the husband, without any violence or threat of violence to the wife, — without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health, — were to exercise mere tyranny, to utter constant insults, vituperation, scornful language, charges of gross offences (utterly groundless), charges of this kind made before her family, her children, her relations, her friends, her servants, insulting her in the face of the world, and of her own domestics, calling upon them (which is one of the cases put below) to join in those insults, and to treat her with contumely and with scorn, — if such



a case were to be made out, or even short of such a case, viz. injurious treatment, which would make the married state impossible to be endured, rendering life itself almost unbearable, then I think the probability is very high that the Consistory Courts of  
 \* 329 this country would so far relax the \* rigor of their negative rule, at present somewhat vague, as to extend the remedy of a divorce *a mensâ et thoro*, to a case such as I have put.

Nevertheless, how can I, as some of the learned Judges below have done, conclude at once, even from assuming the existing law to cover such a case, that therefore, in the case at bar, the remedy is competent merely because circumstances have been figured in which it would be competent when none of these circumstances is here to be found proved, or even alleged. Let us, however, look to the law of Scotland, for it is by no means clear that even now the law of Scotland takes so strict a view of this subject as the English law. Let us examine, therefore, the authorities of that law, which must decide the present case, supposing the facts to exist. And, first, with respect to the text-writers, I need hardly speak of them, for the authority cited by Mr. Anderson of Bankton is really exceedingly vague, and appears to throw very little light upon the subject.. He says, in Book I. title 5, § 132, "There may be divorce upon account of the husband's cruelty or maltreatment." Now it depends upon what is meant by "cruelty or maltreatment," whether this passage applies to the case at all or not. The expression may be confined in the writer's eye to physical maltreatment, to injuries to the person, or threats of such injuries; in which case the authority would have no bearing whatever upon the present appeal.

Then Mr. Erskine is cited. He says: "As it is the wife's duty to live in family with her husband, he cannot be compelled to maintain her in a separate house; yet, if he should either abandon his family, or turn his wife out of doors, or by barbarous treatment endanger her life, or even offer such indignities to her person as must render her condition quite uncomfortable, the Judge will, on proper proof, authorise a separation *a mensâ et thoro*."

\* 330 This \* proves very little; for "indignities to her person" may mean such indignities as we call here personal violence, or threat of immediate violence. If, on the other hand, are meant only indignities of language, or of not associating with her, or of leaving her in a room by herself and not speaking to her, indigni-

ties which render her life uncomfortable, then I can only say that this is not the law laid down in any of the cases save perhaps one, — that of the *Duke and Duchess of Gordon*, and which I take to be already unsustainable as law in Scotland.

Then comes the authority of a very able text-writer, Mr. Bell, who in his “Principles”<sup>1</sup> has said that judicial separation may take place if life is endangered, or, on “fair and reasonable ground of apprehension of personal violence,” or, from “continued annoyance, wearing out and exhausting the party.” Now that is abundantly vague. Clearly, no continued annoyance without threats, and without making it utterly impossible for the woman to live with and endure the society of her husband, no annoyance of an ordinary kind, however continued, can, even by the authorities of the law of Scotland, be maintained as a sufficient ground for divorce.

Next we have Mr. Bell’s “Illustrations,”<sup>2</sup> in which he refers to one or two cases, and among others to that of *Colquhoun v. Colquhoun*,<sup>3</sup> where the Court actually found that the husband had a right to make the wife quit his house and repair to another which he had prepared for her reception, a thing to be very much kept in view here, when we find that this case has been mainly decided on the ground that the husband did not frequent his wife’s society, but made her live in a different part of the same house.

\* We have now to consider the cases, and that of the \*331 *Duke of Gordon*<sup>4</sup> in the first place. Can any man pretend that it is the law of Scotland at this day (certainly the Judges themselves do not so state it), that the following is a sufficient ground of separation *a mensâ et thoro*? “Refusing to allow the wife money for her necessary uses, such as purchasing mourning at the Queen’s death; debarring her from superintending the education of her children, especially her daughters, when young; shutting the doors of his lodging, and keeping her out at night, and thrusting away the coachman for opening the same.” Clearly, all these form no ground of separation; no one can contend it; and the learned Judges did not contend it: therefore the case of

<sup>1</sup> S. 1540.

<sup>2</sup> Vol. II. tit. Judicial Separation.

<sup>3</sup> Morison Dict. Vol. XV. append. voce Husband and Wife, part i. case 5, p. 10.

<sup>4</sup> Morison Dict. Vol. XIV. Husband and Wife, case 112, p. 5902; 1 Fount. 773.

*The Duke and Duchess of Gordon*, if it proves any thing, proves a great deal too much, and I take upon me to say, that if the decision went upon the ground stated, it is not now law. To be sure, there follows in the report a very material addition to the facts, an addition upon which the case must have proceeded, and without which it never could have been rightly pronounced, — I mean the Interlocutor overruling the judgment of the Commissaries and directing the cause to go on. "His scandalous and familiar converse," it is stated, "with one Mrs. Needham, her waiting-woman, and protecting her after the Duchess had discharged her the house." "Scandalous and familiar converse" can only mean one thing, — can only mean illegal connection with that woman. I have no manner of doubt that the Court thought so, and that the case turned upon this material circumstance.

There are one or two other cases relied upon: *Letham v. Letham*<sup>1</sup> is one, — "maltreatment and adultery." Now \* 332 \* what does the Lord Ordinary say as reported there?

"That during the dependence of the action of aliment brought by the respondent, the representer raised a counter action of adherence, and that those actions, upon his own motion, were conjoined, and therefore finds it unnecessary to determine whether the action of aliment was competent. Finds that a maid-servant, with whom the representer had had a criminal intercourse, was allowed to continue in family with him at the time of his marriage, and that after the respondent, on knowing the fact, had justifiably withdrawn from his society, the same person was retained in his family, or was brought back to it; and finds that the gross dereliction of his duties as a husband entitled the respondent to withdraw finally from his society." I take it to be clear, then, that the Court proceeded upon the belief that the adultery existing before the marriage inured afterwards; that it was continued, by his keeping the adulteress, the servant, in the house with his wife.

As for the case of *Shand v. Shand*, which is the only other having any bearing upon the present, I find that the point there decided is foreign to this question. Indeed the case was not stated by Mr. Turner in any other way then, because of the dictum. A case of constant maltreatment is said to have been alleged upon the record; but, let it be observed, that we are left

<sup>1</sup> 2 Shaw & Dunlop, 284.

wholly without any detail, any specification of the particulars of which that constant maltreatment was stated to consist. Accordingly, the case seems to be adduced only for the dictum of the Lord Justice Clerk, who says:<sup>1</sup> "I never dreamt that we were now to go into all this mass of correspondence: we are not in a concluded cause; no proof has yet been allowed, and in the mean time I shall reserve my opinion upon the merits and bearings of the evidence, into which I will not enter at \* present. \* 333 But I never can accede to the proposition that the only legal ground of matrimonial separation must rest on personal violence. That is not the law of the country, and I will venture to say it is not the law of any civilized land. A train of maltreatment may occur in the married state, to be viewed and weighed according to the status of the parties in society." And he then says that she is not "to be precluded from her entire proof when the treatment becomes unbearable." This case, therefore, really proves nothing, except the opinion of the learned Judge that the law of Scotland does not require, and I do not say that it requires, proof of actual personal violence, or even threats of its immediate infliction.

But then, my Lords, the question is, whether the facts before us bear us out in saying that the case at bar comes up to the cases put by the learned Judges, and upon which their opinion seems entirely to have turned. When Lord Jeffrey puts a case which he imagines, for the purpose of showing that not merely violence, but things far short of violence, will justify the Court in pronouncing a separation; such as the holding her up to scorn before her own servants, ordering her servants not only to disobey her, but to join in the chorus of hissing against their mistress, his wife, the mother of his children, at the head of his family; when Lord Jeffrey puts that as a case, I have only to answer it by saying that it is a very good case to support a proposition which I do not deny, viz., that it is not necessary there should be personal violence to constitute a ground for divorce. But it is any thing rather than a confirmation of the judgment here pronounced; because it is enough to say, not only that the two cases are not identical, or even similar, they are actually different. This is nothing like that case. What have we here? Withdrawing from her society, coldness towards her, leaving her apartment, telling \* her \* 384

<sup>1</sup> 10 Shaw & Dunlop, 384.

father that he will on no account ever renew his cohabitation with her, stating that he is wretched in consequence of his marriage, — all things very painful to the feelings of the woman, all things very unhappy for the man, but any thing rather than those things which Lord Jeffrey supposes in the case put, and which, with others of a like kind, appear to have been working more or less in the minds of the learned Judges during all the time they were applying their minds to the consideration of the facts of the case before them, and to have seduced, as it were, their attention from that which ought alone to have occupied it, — the facts proved in evidence before the Court. I remember, among other things in the evidence, a statement that he walked out very much with his sister; that he was frequently seen in her company, never with his wife; that the gardener observed the sister and the brother together, and when they saw the wife coming in sight, they would turn round so as to avoid a meeting. Painful to the wife no doubt all this; painful that he should prefer his sister's society to his wife's, but any thing rather than such cruelty as would justify a sentence of divorce. As for the lesser matter of his not going to church with her; his even not allowing her to attend divine service; his preventing her family from associating with her; and his giving a threat to the father that if they came they should understand it must be at their own peril; of course all this might be very improper in his circumstances, considering the relations of the parties; but it is any thing rather than the cruelty required to support an application for divorce. With regard to the treatment of the wife before the servants, he says distinctly, and it is not traversed on the record, it is not even denied at the bar, that during all this time he remained alienated from her and suffering from his own depression of mind, he never

used a single spiteful, or violent, or scornful expression  
 \* 335 \* towards her. That is not denied. Nay, it is asserted, and no such expressions are proved. Nor is there any thing of the kind in his correspondence with the father, observing upon the state of his feelings, and endeavouring, I think unsuccessfully, to excuse his own previous conduct. It may be further observed, and especially with reference to the cases put below of a husband calling on his servants to join in showing disrespect to their mistress, that the evidence here is the very reverse. It is proved that the servants took their orders from her, habitually treating her as

mistress of the house, always with her husband's knowledge and assent, sometimes by his express direction.

Then, my Lords, this judgment, being of a nature that the law, neither of the one part of the island nor of the other, can support, what remains for us to do but to reverse it, and to take care that, in the reversal, we do not set up the first interlocutor of the Lord Ordinary, which appears, erroneously, to lay down that nothing but actual personal violence will suffice as a ground of divorce. I should be sorry that such a view of the law of Scotland should go forth, as implied the propriety of dismissing the action, "in respect the libel is laid upon a series of insults and indignities said to have been offered by the defender to the pursuer, unaccompanied with personal violence, or any menace thereof; and that, without an allegation to that effect, it appears to be settled on authorities, which the Lord Ordinary is not entitled to question, that a libel at the instance of a wife against a husband, founded on such averments as those now urged, is not relevant." That, my Lords, is not the law of Scotland; it is not the law of England; it is an inaccurate statement of the law in both countries; though I will not say that the law of Scotland, as far as decided cases go, may not extend somewhat further than our laws in favour of the remedy.

\* I shall propose to your Lordships this course: to reverse \* 886 the interlocutor appealed against of the 13th January, 1846, in so far as it remits the case to the Lord Ordinary, with instructions to open the record, and proceed in the cause; but to affirm that interlocutor in so far as it alters the interlocutor of the Lord Ordinary, with respect to the grounds of his dismissing the action. It will, therefore, stand thus: that you, giving the same judgment as the Court below ought to have given, alter the interlocutor of the Lord Ordinary, in respect of the restricted view which he takes of the grounds of a sentence of divorce; but affirm the interlocutor of the Lord Ordinary in so far as, independently of those reasons, it dismisses the suit. Then, in respect of the ultimate decision of the Court below, the second interlocutor appealed from, of the 24th January, 1849, which grants a "remit to the auditor to tax the account of expenses and to report, and before answer as to the question of aliment, ordains the defender within fourteen days to give in a special condescendence of the amount of his means and estate," that must be reversed altogether.

In thus moving your Lordships, I must add, that I sincerely lament the unfortunate fate of this lady to be wedded to such a life. I view, with a disposition charitably to extenuate, if I could justly, the conduct of Mr. Paterson. He appears to have been led on, from one thing to another, without due reflection upon the necessary consequences of what he was doing. From his pecuniary circumstances, coupled with the attachment which he seems for a moment to have formed for Miss Russell, he appears to have been drawn into a course of proceeding which is wholly indefensible, of which he must in part pay the penalty, but from which the wife, the more innocent party, must be still made a sufferer.

\*837 \*With these observations, I move your Lordships to reverse the one interlocutor altogether, and to alter the other interlocutor in the way I have stated.

*Mr. Turner.* — Before your Lordship proceeds to put the judgment of the House, you will be aware that the case is a peculiar one with reference to costs. Your Lordship observes the nature of the suit.

LORD BROUGHAM. — We cannot give her the costs when she sues her husband and fails.

*Mr. Turner.* — Ordinarily speaking, the husband pays all the costs in suits of this description.

LORD BROUGHAM. — In Doctors' Commons, when the husband sues he pays all the costs, even of an appeal to the Arches.

*Mr. Turner.* — So it is in Scotland.

LORD BROUGHAM. — Dr. Harding, when the wife fails in an attempt to obtain a separation *a mens et thoro*, do you ever allow her costs from the husband who succeeds?

*Dr. Harding.* — I do not remember a case of any application for costs in such a case being made to the Court, and for this reason: in Doctors' Commons, the wife takes care to get her costs out of the husband *de die in diem*.

LORD BROUGHAM. — Do you mean when she sues him?

*Dr. Harding.* — When she sues him for a divorce, she may do so.

LORD BROUGHAM. — When she sues him for a divorce, does she not get her costs, supposing she fails?

*Dr. Harding.* — She does not make an application, after having failed.

LORD BROUGHAM. — But she does before failing? If she suc-

ceeds, of course she will get costs ; but suppose it remains *in dubio* whether she may succeed or not, does she then get her costs *de die in diem* ?

*Dr. Harding.* — Yes, my Lord, I believe she does, if she \*chooses, on the ground that she has nothing of her own, \* 338 — that she has not wherewith to sue.

*Mr. Turner.* — That is more strongly the rule in Scotland. In this case, they gave the costs of the Court below ; but if your Lordship reverses the interlocutor, we shall not recover those costs.

LORD BROUGHAM. — It must be reversed, with the exception of the part of it which awards her her costs ; she will, of course, get no costs here.

*Mr. Turner.* — Probably your Lordship will reserve the costs of the appeal. We have come here supporting the judgment of the Court below.

LORD BROUGHAM. — Yes, but here the respondent never gets costs at all when he fails. All we have now to do is, to reverse the interlocutor complained of, with the exception of the portion of it which allows costs to the wife in the Court below.

*Mr. Turner.* — I should apprehend that your Lordship would look at this question of costs with reference to what the case would be in the Privy Council. Supposing the wife had succeeded in the Court below, and there had been an appeal to the Privy Council, or to the Delegates, the course of the case there would have been —

LORD BROUGHAM. — There is a peculiarity in that jurisdiction. We there give costs to the party who succeeds in reversing ; that we never do in this House ; our rule is a perfectly peremptory one.

*Mr. Turner.* — I am quite aware of that, my Lord, as a general rule in ordinary appeals ; but the present is almost the first case of this description that has ever come up to this House.

LORD BROUGHAM. — We will look into it. In Doctors' Commons and at the Delegates, and that which is substituted for the Delegates, the Judicial Committee, we constantly, both in \* Indian cases and in Consistorial cases, direct the \* 339 costs of the appellant to be paid by the respondent, when the appellant succeeds ; but here no such thing is ever done.

*Mr. Turner.* — Your Lordship observes, that this is the first case of the kind brought to this House.

LORD BROUGHAM. — Nor is it done in the Court of Chancery.



*Mr. Turner.* — No, my Lord, I quite agree ; but the principle which governs the case is this : that the wife has nothing to sue with, and therefore the Court awards her the costs.

*LORD BROUGHAM.* — Yes ; but you may just as well say that if the wife indulges in any other luxury than law, — if she goes into a shop and buys that which is beyond her degree, — the husband has a duty imposed upon him to pay.

*Mr. Turner.* — Your Lordship observes, that the luxury of your Lordships' judgment against her is not her seeking.

*Dr. Harding.* — Your Lordships have decided that she had no grounds at all for originally suing. We ought not to be made to pay the costs of that.

*LORD BROUGHAM.* — We decide that she had no grounds. One thing I ought to have taken notice of, that her conduct, or that of those who have advised her, is highly reprehensible. I never saw a more scandalous matter introduced upon a record than those charges, those foul charges, wholly unsupported, wholly unproved, nay, I may say negatived, — the suggestion of incest between this gentleman and his own sister. That is a feature in the case which it is exceedingly painful to contemplate, and a consideration of it will govern my discretion, if any we have, as to giving costs.

*Mr. Turner.* — On the other side, your Lordships must take into your consideration the conduct of the husband,  
\* 840 \* and the general rule which gives the wife the costs. The first interlocutor appealed from, my Lord, gives the same direction upon costs.

*LORD BROUGHAM.* — Are there costs upon the first interlocutor ?

*Mr. Turner.* — Yes, my Lord.

*LORD BROUGHAM.* — Then we must make the same exception. But we allow the first interlocutor appealed from to stand, except so far as I have stated.

*Dr. Harding.* — That interlocutor protects itself.

*First interlocutor reversed, with certain exceptions. Second interlocutor reversed, with an exception as to costs in the Court below. The question of the costs of the appeal reversed.*

1850. August 9.

*LORD BROUGHAM.* — After hearing and considering this case, there was a reversal of the interlocutor of the Court below.

But as there is no instance of the costs of the appeal being given in this House in a case of this kind, I do not see how it is possible to do so here. We do it in the Judicial Committee of the Privy Council; but we do it because it used to be done in the Court of Delegates, and the Judicial Committee has come in the place of the Court of Delegates;<sup>1</sup> and we also do it in Indian cases, which fall within the scope of a like rule; but we never give the costs in an appeal from any Colonial court. It is no doubt a very hard case.

## \* BRIGHT v. HUTTON, AND HUTTON v. BRIGHT.

\*341

1851. 1852. June 21, 22, 26, 23.

HENRY SMITH BRIGHT, *Appellant*.JAMES HUTTON, *Respondent*.

AND

JAMES HUTTON, *Appellant*.HENRY SMITH BRIGHT, *Respondent*.

*Winding-up Acts. Contributory. Equitable Liability. Practice.*  
*House of Lords, Alteration of former Judgment in.*

A projected railway company, provisionally registered, is within the meaning of the Winding-up Acts, which may therefore be applied to it if a Court of Equity shall so think fit.

The liability of a person as a contributory under the Winding-up Acts is not a question of law, but of fact. The test of his liability in equity is his liability at law.

Contributories are those only who have contracted, by themselves or agents, with a creditor, or who have agreed to indemnify or repay, in part or in all, those who have contracted with the creditor on their own account.<sup>1</sup>

A. was a member of the provisional committee of a projected railway company, which had been provisionally registered, and the affairs of which were put under the authority of a managing committee. He accepted shares, and paid a deposit on them; but did no further act. The scheme was abandoned:—

*Held*, that on these facts he was not liable to a creditor for business done under the orders of the managing committee towards completing the projected under-

<sup>1</sup> The Court of Session, in a divorce case, sits as an Ecclesiastical Court.

<sup>2</sup> See *Oakes v. Turquand*, Law Rep. 2 H. L. 325, 331.

taking and converting the association into a regular company, and consequently he was not liable as a contributory under the Winding-up Acts.

This House is at liberty, without regard to the form of an appeal, or the points raised upon it, to put questions of law to the Judges.

*Quære.* Whether this House, like any other Court of Justice, may, in a subsequent case, overrule a previous decision of its own.

THESE were appeals brought against two orders of Vice-Chancellor Lord Cranworth, made on the 3d of July, 1851, under the following circumstances. In the year 1845, a company was formed for the purpose of making a railway between Birmingham and Brighton, through Oxford and Reading. The capital of the \* 342 proposed company was to be \* 2,000,000*l.*, divided into 80,000 shares of 25*l.* each, and the deposit was to be 2*l.* 10*s.* per share, with 2*s.* 6*d.* per share added, under the Registration Act, for preliminary expenses. The company was provisionally registered on the 5th of August, 1845, under the 7 & 8 Vict. c. 110, by the name of "The Direct Birmingham, Oxford, Reading, and Brighton Railway Company." A prospectus was published, on the 25th of September, by the promoters, containing the names of the provisional committee-men, of whom Mr. Bright was one, and likewise a statement of the objects of the company. On the 2d of October, Bright wrote a letter to the secretary of the company, requesting to know what number of shares had been allotted to the directors. On the 8th of October, a meeting of the provisional committee was held, at which a committee of management was appointed, and resolutions were passed giving authority to the committee of management to allot shares, and to apply the funds of the company in payment of all expenses incurred in its formation, and in the preparation of the plans and sections to be submitted to Parliament. Bright was not present at this meeting; but a copy of these resolutions was alleged to have been forwarded to him, as a member of the provisional committee. This copy he denied ever to have received. The persons composing the managing committee employed solicitors, agents, engineers, and others, to do the necessary acts for the complete formation of the company, and in the preparation of plans, sections, and books of reference required by the Standing Orders to be deposited before the 30th of November, 1845, as a necessary preliminary to obtaining an Act of Incorporation. The expenses thus incurred were afterwards found to amount 10,174*l.* 11*s.* 5*d.*

On the 9th of October, the managing committee passed a resolution that each member of the provisional committee should have 100 shares. On the 10th of October, Mr. \*343 Rayner, the secretary of the company, sent a letter to every provisional committee-man, informing him that "the committee of management has apportioned 100 shares in this company to each member of the provisional committee," and asking to be informed whether the person thus written to would take that or any less number of shares.

On the 14th of October, Mr. Bright wrote, accepting the 100 shares placed at his disposal as a member of the provisional committee. On the 18th of October he received the allotment of the 100 shares, and immediately paid 262*l.* 10*s.*, being the amount of the deposit of 2*l.* 10*s.* on the shares, and of the additional 2*s.* 6*d.* for preliminary expenses. He did not in any other way authorise the managing committee to incur any expenses, never was an actual party to any contract by which they were incurred, nor was ever present at any meeting of the company.

Out of the 80,000 shares of which the company was to consist, only 67,630 shares were allotted; and deposits were paid on 4,295 alone. No Act of Parliament was ever applied for, and the scheme was abandoned.

On the 21st of December, 1849, the late Vice-Chancellor of England made an order for the dissolution and winding up of the company, under the provisions of the Joint Stock Companies Winding-up Acts for 1848 and 1849. The affairs of the company were referred to W. Brougham, Esq., the Master in rotation, who appointed Mr. Hutton the official manager of the company. The official manager, in his report, stated that a sum of 10,174*l.* 11*s.* 5*d.* had been expended by the direction of the committee of management; that he had dissected the several items of this expenditure, with the view of ascertaining how far this amount was to be taken as expended in the formation of the company, and he stated "that a portion of this sum was \* expended after \*344 the 30th of November, 1845, when, by the non-deposit of the plans and sections in compliance with the Standing Orders of Parliament, the company was not in a position to go to Parliament in the ensuing session." He then made a tabular arrangement, comprising three periods during which the expenses were incurred, the first being "prior to the 8th of October, 1845, when, at a meet-

ing of the provisional committee, the scheme was adopted, the committee of management appointed, and the powers before referred to, given; 2d, those expenses which were incurred between the 8th of October and the 14th, the date of the acceptance of shares by the provisional committee; and, 3d, those expenses incurred between the 14th of October and the 30th of November." The Master, by his report on the 13th of June, 1851, found all these facts, and then, dividing the liabilities according to the three periods above mentioned, he found that each of the persons whom he had, as provisional committee-men and acceptors of allotments of shares, placed on the list of contributories, was "legally liable to bear and pay his rateable proportion of the necessary expenses of the committee in preparing the launch of the common concern incurred between the 13th of October and the 14th of November, both inclusive, being the sum of 4,562*l.* 10*s.* 7*d.*" Among the persons thus mentioned, he included Mr. Bright, and he then directed a call of 10*l.* per share.

On the 3d of July, 1851, a motion was made on behalf of Bright, before Vice-Chancellor Lord Cranworth, to vary or discharge the order for the said call, when his Lordship declared that "he did not think fit to make any order upon the motion," but ordered "that the official manager do pay unto the said H. S. Bright his costs of this application."

On the same day an application was made on behalf of the official manager, that "the decision of the Master,  
\*345 \* declaring H. S. Bright legally liable to pay his rateable proportion of the expenses of the committee in preparing the launch of the common concern incurred between the 14th of October, 1845, and the 30th of November, 1845, both inclusive, might be reversed, and that it might be declared that H. S. Bright was liable, in addition thereto, to bear a rateable proportion of the said expenses before the 14th October and subsequently to the 30th November, down to the abandonment of the company." The Vice-Chancellor made an order declaring, that "the Master's report be confirmed, and that he did not think fit to make any order on the said motion, but did order that the official manager do pay to Bright his costs of the application."

Bright appealed against the former, and Hutton against the latter order.

The appeals came on for argument on Wednesday, the 6th of

August, 1851 (see ante, p. 193), but were not then decided, being ordered to stand over for the attendance of the Judges.

1852. June 21.

On the 21st of June, in the present year, the Judges were summoned, and eleven of their Lordships attended.

LORD TRURO, who then occupied the woolsack, said: The questions which the House desires to have argued are, whether a railway company, which was only provisionally registered, comes within the Winding-up Acts; and, if so, then whether Bright was, under the circumstances of this case, liable as a contributory, and to what extent.

*Mr. Cooper*, for Bright, said that the first of these questions had always hitherto been assumed, and he was not prepared to argue it at that moment.

*Mr. Bethell*, for Hutton. — This first question is not one which comes within the scope of either appeal. The order made for winding up the company has not been brought up to this House, and the relation between the parties does \*not \*346 admit of the argument. The order declaring Bright to be liable has not been questioned; the amount of liability is all that has been disputed or is now in contest before this House. While the order below stands unappealed against on this ground, this question cannot be argued.

LORD BROUGHAM. — We have now the advantage of the attendance of the Judges: we frequently put questions to them besides those which are the questions in the cause.

LORD TRURO. — Suppose this was an action for contribution, as it is in substance a proceeding to enforce contribution, would not a Court of Law, in discussing the question how far the defendant was liable to contribute, think itself at liberty to consider whether he was liable at all? In the same manner, this House, in discussing the order which fixes on Bright a liability to a certain extent, may consider whether there was any jurisdiction in the Court below to make an order fixing on him any amount of liability.

*Mr. Bethell*. — But liability to a certain extent has been established by the order, against which no appeal has been brought.

LORD TRURO. — Suppose there was an action on that order, would it not be an answer to that action, that the order was made without jurisdiction?

*Mr. Bethell.* — The House must be consistent with itself ; it has already decided that it cannot depart from the petition of appeal. There was an attempt last year made to raise this very question, which it is now desired to discuss. I made the same objection as now, namely,<sup>1</sup> “ If the House allowed that question to be discussed, it would be assuming an original, not exercising an appellate, jurisdiction.” And the House, which was then presided over

by Lord Brougham, distinctly declared that no discussion  
\* 347 on \* the point could be heard.<sup>2</sup> No such argument can be heard till the petition of appeal is amended.

LORD BROUGHAM. — If that is to be done, it must be done before to-morrow morning.<sup>3</sup> We are not bound by the form of an appeal as to any questions we may think fit to put to the Judges. The House will adjourn now to give counsel time to prepare to-morrow to argue the points which have been stated by Lord Truro. The question will be argued by one counsel on a side.

June 22.

The Judges again attended. There were present Barons Parke, Alderson, and Platt, and Justices Maule, Wightman, Erle, Williams, Talfourd, Martin, and Crompton.

The Lord Chancellor presided. Lord Brougham, Lord Truro, and Lord Cranworth were present.

*Mr. C. P. Cooper* (*Mr. Morris* was with him) : —

The first question is, whether the so-called company, but which was never in fact a complete company, falls within the provisions of the Winding-up Acts of 1848 and 1849 ; and, secondly, if so, whether Bright is liable as a contributory beyond the sum he has already paid as deposit on the allotment of shares to him. It has repeatedly been the subject of regret with Judges in the Court of Chancery, that companies of this kind, or rather projects of companies, should be treated as if they were complete companies. *Ex parte James*.<sup>4</sup> The Courts of Law have not recognised them as such. The case of *Walstab v. Spottiswoode*<sup>5</sup> — which could not have been decided as it was, if a merely projected company had been a complete company — distinctly declares, and the declaration is  
\* 348 made \* as to this very scheme, that an association of this na-

<sup>1</sup> *Norris v. Cooper*, ante, p. 180.

<sup>4</sup> 1 Simons N. S. 140.

<sup>2</sup> *Norris v. Cooper*, ante, p. 180.

<sup>5</sup> 15 Meeson & Welsby, 501.

<sup>3</sup> Nothing was afterwards said about amending the petition.

ture does not amount to a partnership. There are many instances where a liability has been established, but they are all cases where there has been a partnership, or a *quasi* partnership. None such exists here, and to bring a scheme within these Acts, the company must be completely formed. In *Van Sandau v. Moore*,<sup>1</sup> Lord Eldon shows that the present practice of the Court of Chancery was not that which existed in his earlier days, for he there expresses his regret that, when joint stock companies consisted of a vast number of individuals, it was impossible to make their affairs the subject of investigation in Chancery; for, by the rules of the Court of Chancery, every one of the shareholders must be a party to the suit; that no one of them could maintain a suit for himself and others. Subsequently to that case, the practice of the Court of Equity has been altered in this respect, and that alteration created the necessity for what are now called Joint Stock Companies Acts.

In order to ascertain the meaning of the Winding-up Acts, the Registration Act, 7 & 8 Vict. c. 110, must first be considered. Nothing but a complete company, not a bare scheme for the formation of one, was there contemplated. The first section of that statute speaks of "joint stock companies," and of "companies constituted and regulated,"—expressions incapable of being applied to any body of persons merely engaged in forming a company. In section 2, it speaks of "any joint stock company established," and then declares that the term "'joint stock company' shall comprehend every partnership"; and by section 3, the word "company" is to "mean any joint stock company as before defined"; that is to say, any company established and constituted, or any regularly formed partnership of a large number of persons. The \*Statute 7 & 8 Vict. c. 111, which was the \*349 first Winding-up Act, speaks of any "company or body of persons associated together for any trading or commercial purposes"; but the whole scope of that Act shows that it was only intended to apply to the case of an established company,—established, too, for such a purpose,—and where there is a joint liability, and the action in respect of it may be brought against one in respect of all.

The next Act is the 9 & 10 Vict. c. 28,—the "Act to facilitate the Dissolution of Certain Railway Companies." That Act applies to cases where there has been a substantive contract, and a *quasi*

<sup>1</sup> 1 Russell, 441.



partnership has been created; and in such cases, all the parties contracting are liable to the expenses which may be incurred. Where there has been a substantive contract, the association cannot be considered as an abortive company; and by speaking of the "dissolution of the company," it is plain that the company must have existed,—in fact, it must have been fully formed.

Then comes the 11 & 12 Vict. c. 45, which recites the previous Acts, and declares that it "shall apply to all companies, corporate or unincorporate, within the provisions of either of the two Acts first hereinbefore mentioned." The word "company" is to mean "any partnership, association, or company, corporate or unincorporate." All these expressions point to constituted bodies, and not to mere meetings of men who propose at some future time to constitute a company or partnership.

The 12 & 13 Vict. c. 108, again speaks of "all partnerships, associations, and companies," and for the first time introduces the limitation as to numbers, "whereof the partners or associates are not less than seven in number; but every thing in that, as in the preceding Acts, shows that an existing, not a merely contemplated, company is meant. These Acts can only apply where there is a joint liability, and an action may be maintained against one member in respect of all; where each is liable for all the debts incurred for the partnership purposes of the company.

There are two classes of persons,—those who have only equitable rights, which are enforceable in Chancery, and those who have legal rights, enforceable in a court of law. In a company not formed, there can be no legal rights arising from the mere relationship of the parties as joint projectors; and to any actions brought under such circumstances, every one individual would have a right to make a separate defence. Suppose one of the provisional committee-men had paid a debt, and then brought an action against another for contribution; the claim must be made, not in respect of an equitable, but of a legal right. The defendant could demand proof of the authority he had given for the act under which he was to be made liable. No such question of authority could arise where a partnership really existed, for the authority there is presumed. No general authority can be presumed here. The Master himself has made a distinction in this very case between certain classes of persons; for he finds some of

the provisional committee-men to be liable for debts before the 14th of October, some between that time and the 30th of November, and some after the last of these dates. So that the Master, instead of dealing with equitable rights upon an ascertained rule, has thought himself compelled to try a question of liability, as if it was to be determined as a matter of fact, and in a Court of Law. [Mr. Cooper was about to address himself to the second point, but the Lord Chancellor informed him that the House expressly desired him, in the first instance, to confine himself to the question of the company being \*within the Winding-up Acts.] \* 351 The cases upon this subject are not directly in point, but they all show that the principle of contract or no contract is that which is properly applicable; and that liability does not arise from a mere implication of law. In *Lefroy v. Gore*,<sup>1</sup> which was a case between two provisional committee-men, where the railway scheme had not been carried into execution, the Lord Chancellor of Ireland held that the test of the liability to contribution was liability to the plaintiff at law, and that the mere holding of shares in the projected company could not create such a liability. That must be the rule; and if so, how could one of these provisional committee-men sustain any claim against any other of them? Where the right exists among the parties to compel contribution, the remedy is known at law; it is the writ *de contributione facienda*, which enables, for instance, one tenant in common of a mill, who has repaired the mill, which both are bound to repair, to come upon the other for contribution. His right to do so rests entirely on a legal liability. A noble and learned lord, in moving the judgment of this House in *Norris v. Cottle*, referred to this writ,<sup>2</sup> and stated that, in cases of claims like this, relief was worked out in equity simply on account of the cumbrousness of the proceedings at law; but he referred the liability in equity to a legal foundation. All the entries in *Brownlow* and in *Rastall* confirm that statement. In the Insurance Law, there is the same principle of contribution, which is again treated as referable to legal liability: *Park*,<sup>3</sup> and *Arnould*,<sup>4</sup> on Insurance. The principle here is the same as in that of suretyship, which was explained

<sup>1</sup> 1 Jones & La Touche, 571, 581.

<sup>2</sup> 2 House of Lords Cases, 671. By a mistake in the printing, the word "copartner" stands in the passage referred to, instead of "coparcener."

<sup>3</sup> Tit. Gen. Average.

<sup>4</sup> Vol. II. p. 877.

\* 352 \* by Lord Eldon in *Cowell v. Edwards*;<sup>1</sup> and the same principle was adopted by Mr. Justice Bayley in *Browne v. Lee*.<sup>2</sup> There is no authority for asserting that the doctrine in equity is different from the doctrine at law, or that there can be any liability in equity greater than that which would exist at law. In a case like this, no action at law could be maintained, *Hunter v. Hunt*,<sup>3</sup> nor any claim for contribution be supported, and consequently the scheme itself cannot be made the subject of proceedings under the Winding-up Acts.

*Mr. Bethell* (with whom was *Mr. Roxburgh*).—This appeal cannot be sustained, on the ground that a provisionally registered company is not within the Winding-up Acts. No such question was discussed in the Court below. The Master made an order to include Mr. Bright among the list of contributories; an appeal was made against that order by Bright, but Vice-Chancellor Lord Cranworth refused to make any order on the matter, and he directed that the official manager should pay the costs of contesting it. The official manager applied to have Bright's liability extended, but the result was the same. No other matter than this of the individual liability of Bright to be placed in the list of contributories is now before this House. By the 79th section of the 11 & 12 Vict. c. 45, the settling of the list of contributories by the Master is conclusive.

[LORD TRURO. — Suppose this order was attempted to be enforced by execution against the goods of the contributory, and he brought trespass, would not a Court of Law inquire into the validity of the order? The House is now asked, \*not to discharge the order, but not to allow it to be enforced.]

There is no resemblance, for such a purpose, between a Court of Law dealing with an action of trespass, and this House dealing with this order. This is only one of a series of orders, all of which ought to have been made the subject of appeal, if the right to make this particular order is to be disputed. This should have been done in the Court below, under the 99th section of the Act of 1848; it not having been done, this appeal cannot be maintained, on the ground of there being no authority to make the order. The propriety of the order for winding up cannot now be

<sup>1</sup> 2 Bosanquet & Puller, 268; and see the note at the end of the case.

<sup>2</sup> 6 Barnewall & Cresswell, 689.

<sup>3</sup> 14 Law Journal N. S. C. P. 113.

contested. This House cannot make any order which the Judge of the Court below might not have made. Now it is clear that the Vice-Chancellor could not, on the proceedings then before him, have made any order declaring that this case was not within the Winding-up Acts, yet it is wished to argue that question in a discussion of an incidental matter, which is alone the subject of the jurisdiction of this House. To allow this to be done will be to set at naught the principle of not permitting to be questioned, much less reversed, decrees and judicial proceedings not expressly brought before this tribunal. What is now sought to be done would be an excess of jurisdiction, and was expressly refused by this House in the case of *Hutton v. Thompson*.<sup>1</sup>

[LORD BROUGHAM. — But I was here alone at that moment, and afterwards the House differed from me, and did put a question to the Judges upon the point.]

But the question ought not to have been put, for it was put upon a point on which the House had declined to hear any argument. Besides which, though the question was put, it was not answered.

\* *Mr. Cooper*. — It was stated at the time by Lord Chancellor Truro,<sup>2</sup> that “this latter question it may not be necessary for your Lordships to consider,” and the answer of the learned Judges to one question did, as the Lord Chancellor then anticipated, render the consideration of the other unnecessary.

LORD BROUGHAM. — Besides which, as I have before stated, the Judges are in attendance now to answer questions which were not then answered, but which, without regard to the form of an appeal, we are at full liberty to put to the Judges for our own information.

THE LORD CHANCELLOR. — The House is now fully possessed of the objection to its jurisdiction, and it desires the argument to proceed upon the other point.

*Mr. Bethell* then addressed himself to the other question.

In order to ascertain whether a company of this description falls within the Winding-up Act, the character and nature of the intended company must be ascertained. The prospectus gives this information. The company is one established for profit; it is

<sup>1</sup> 3 House of Lords Cases, 180.

<sup>2</sup> Ante, p. 185.

a company "whereof the capital or shares is or are transferable without the express consent of all the copartners"; it is a "partnership association or company," and it is, therefore, within the meaning of the Act 7 & 8 Vict. c. 111, a "company" established for "commercial or trading purposes." All such associations or companies are within the meaning of the Winding-up Acts, whether they are actually formed or are only intended to be formed. The word "association," employed in the 12 & 13 Vict. c. 108, seems expressly intended to meet such a case. This particular

\* 355 company, as the prospectus \* states, is to have a capital of "2,000,000*l.*, in shares of 25*l.* each." It has all the requisite officers, and the prospectus carefully sets forth the advantages that will arise to the public from it. No man can doubt that the company was projected as a means of obtaining profits from the trade of carrying. If so, then it is impossible to deny that a body of persons meeting together for the purpose of forming a commercial or trading company, must, even before the company is completely formed, come within the description of persons associating together for such purposes. They must constitute an association within the 12 & 13 Vict. c. 108. It is quite clear that this company is within the 7 & 8 Vict. c. 111, and, if so, it is within the 11 & 12 Vict. c. 45. The first of these statutes defines the companies, and the second adopts its definitions and applies them. If this company, when completely formed, would have been a company established for commercial or trading purposes, then, before it is completely formed, it is an "association" of persons associated for such purposes. The argument on the other side amounts to nothing but a proposition that the language of the statutes is confined to companies actually established, and established for commercial and trading purposes, while it assumes that a provisional committee may exist in what is not a company, a partnership, nor an association. This argument refuses a proper scope to the words "commercial and trading," and disregards the language of the 7 & 8 Vict. c. 111, — "any body of persons associated together for trading or commercial purposes," although that Act is expressly incorporated into the 11 & 12 Vict. c. 45, consequently incorporated into the 12 & 13 Vict. c. 108, and by this means not only gets rid of the technical words "company"

\* and "partnership," but of that still more extensive word \* 356 "association," which has been thus for the \* first time

introduced into these statutes. It was on this very enactment in the 11 & 12 Vict. c. 45, that Lord Cottenham held that a railway company not incorporated came within the meaning of the first statute. To meet the difficulties that it was supposed might arise from applying such a construction to the law as it then stood, the Winding-up Act of 1849 was introduced, and in that Act the most general form of words was employed, applying the law "to all partnerships, associations, and companies whereof the partners or associates are not less than seven in number, whether incorporated or unincorporated," and light is shed upon the subject by the words "other than and except railway companies incorporated by Act of Parliament," words which seem expressly intended to include railway companies, or associations to form perfect companies, that have not been so incorporated. No railway company, provisionally registered, could be brought within the 11 & 12 Vict. c. 45, unless it had published a prospectus from which it was clear that it was formed for commercial and trading purposes. The argument here is, that this particular company does come within that description. The argument in *Barber's Case*,<sup>1</sup> that a mere railway company could not be said to be a trading company, was satisfactorily answered by the observation that it was a company formed for the purposes of profit. Though the 11 & 12 Vict. might have been confined to companies answering the particular description contained in that statute and in the preceding statute of the 7 & 8 Vict. c. 111, a larger and more extended application must be given to the 12 & 13 Vict., which extends to "all associations whereof the associates are not less than seven in number." In this way the difficulty arising from the technical use of the word "partnership" is obviated. The language of the Registration Act is conclusive. It anticipates this very state of things. It allows the promoters of a company to \* assume \* 357 the name of the intended company (s. 23), "but, coupled with the words 'registered provisionally.'" It is a misfortune that this section was not adverted to when the law was settled, that the promoters of a company, thus associated together, did not form a partnership in the sense of every one being liable for any thing bought, or any work which he had not individually authorised. If they knew what was to be done, and, being members of the provisional committee and therefore having the power to

<sup>1</sup> 1 Macnaghten & Gordon, 176.

object, did not object, but allowed the things to be done, they did authorise the doing of them, and so became liable. This view of the matter is that which was taken by the Lord Chancellor in *Ex parte Sharpe*, which occurred on the 21st of April in the present year, and is reported in "the Law Times" of the 19th of June last.<sup>1</sup> His Lordship there referred to the decision of *Upfill's Case*, which he justified, adding, that besides the fact that Upfill, being a provisional committee-man, had accepted shares, there was on the face of the report another strong reason why he should be held to be a contributory; namely, "that the managing committee received authority, by the prospectus under which they were all acting, to carry on the concern, and to incur all necessary expenses, before the Act of Parliament was obtained." His Lordship then went on to say: "Well, but has the being a party to that, no weight with it? The man who makes himself a party to that transaction must contribute, of course, to the expenses, as the expenses are incurred according to his own dealing under that contract: being a provisional committee-man, he must be taken to have known what was the constitution of, and what was proceeding in the company; and the man who has made himself a party to sanction such an expenditure, and who knew the terms

\* 358 on which the company \*in *Upfill's Case* was proceeding, could not, under the circumstances which are mentioned in the report of that case, be heard to say that he was not liable for the expenditure he had so sanctioned, under a contract, as a provisional committee-man." There is, indeed, strong reason to treat such a person as liable upon a contract made by his authority. That principle was originally laid down in the case of *Barnett v. Lambert*,<sup>2</sup> where the defendant had consented to become a member of the provisional committee, and had attended one of the meetings of the committee, and where he was held liable for stationery supplied under the order of the secretary, after the date of his letter accepting the office of provisional committee-man. Apply the principle of these two decisions to the present, and there can be no doubt of the liability implied by law from certain acts of the party.

It is true that in *Ex parte James*,<sup>3</sup> it was said by Vice-Chancellor Lord Cranworth, when speaking of a company only provision-

<sup>1</sup> Vol. XIX. p. 194.

<sup>2</sup> 1 Simons N. S. 146.

<sup>3</sup> 15 Meeson & Welsby, 489.

ally registered: "It does not follow that all these persons are liable to contribute; the very contrary has been decided in a Court of Law. Each, in law, is liable only for those acts which he has expressly or impliedly authorised." But with that may be contrasted the language of the Lord Chancellor, in *Ex parte Sharpe*, and the language of the legislature, which gives the provisional committee the right to assume the name of a company, and to do every thing necessary for the accomplishment of the purposes for which the persons intending to form one had associated themselves together. Here these persons have associated for the very purpose mentioned in the prospectus. There is no doubt of the power of this House to alter what has been done; but this House has always made a wise and temperate use of that power, and has endeavoured to guide its own course by the light of previous decisions. So strong \* and clear has been the light from those decis- \* 359 ions on this point, that, in *Ex parte James*, Lord Cranworth said: "It is, however, now too late to contend that these associations for the formation of companies are not within the terms of the Winding-up Acts." Lord Brougham, in *Hutton v. Upfill*, said: <sup>1</sup> "I entirely agree with Lord Cottenham's first observation, in giving judgment in *Besley's Case*,<sup>2</sup> when he says, 'I cannot for a moment entertain the idea that this company had not advanced to that state which made it the proper object of an order under the Winding-up Act. It may be quite right to draw within the operation of the Act associations or companies of this kind, for such an association may require the aid of the Act just as much as if it had gone on further. Whether in this case you call it a company, or an association, or any other name, it is quite immaterial, because it is a company, in fact,—it has become a company within the meaning of the Winding-up Act, and as such, the Court has power to wind up its affairs.' " So that here are the three opinions of the Lord Chancellor and Lords Cottenham and Brougham, that when an association—for "the name is immaterial"—has been formed, it falls within the Acts.

[LORD BROUGHAM. —I ought to mention that after that was reported, and I have no doubt accurately reported, Lord Cottenham, in speaking with me on this subject, gave me reason to believe that he did not entertain quite so strong an opinion on the

<sup>1</sup> 2 House of Lords Cases, 693.

<sup>2</sup> 2 Macnaghten & Gordon, 176, 2 Hall & Twells, 375.



subject as he had before entertained. I do not mean that he changed the opinion he had expressed in *Barber's* or in *Besley's Case*, but that his opinion was less strong than it had been,—more hesitating. LORD TRURO. — Any one of the promoters may register provisionally, — a single individual may do it.] [*Mr.*

*Cooper* referred to the second case of *Ex parte Besley*,<sup>1</sup>

\* 360 where \*Lord Chancellor Truro intimated a doubt<sup>2</sup> whether a mere association not completely formed as a company was within the meaning of the Winding-up Acts.]

Perhaps so, but a doubt suggested in that manner is not to be put in opposition to a plain and direct decision of Lord Cottenham, pronounced on the first case of *Mr. Besley*,<sup>3</sup> where his Lordship said: “Does not the Winding-up Act assume that every association shall come within the term ‘company,’ so that, whether it is called a provisional committee or by any other name, if certain functions are assumed, it is a company within the meaning of the Act?” and his Lordship afterwards added the observations already quoted.

After what has passed in all the Courts, it would now be most dangerous to unsettle the law on this subject. In *Beardshaw v. Lord Londesborough*,<sup>4</sup> Mr. Justice Maule said: “I believe it has been rightly decided that a company of persons, not registered, such as are commonly called promoters of a scheme, may be treated as a company under the Act of Parliament.” In the case of the *St. James's Club*,<sup>5</sup> which was a company not formed for trading or commercial purposes, but for the convenience of officers of the militia, Vice-Chancellor Knight Bruce held the club to be within the operation of the Winding-up Acts. In the same manner, in *Ex parte J. Smith, In re The Sherwood Loan Company*,<sup>6</sup> Vice-Chancellor Lord Cranworth said: “Secondly, it was said that this was not a company within the meaning of the Acts. Now I think it very doubtful whether it would have been within the meaning of the first Act; but undoubtedly the words of the second Act are so large as to take in almost every associa-

\* 361 tion, \*if there is the requisite number of seven members.

The language of the Act is very comprehensive; it em-

<sup>1</sup> 3 Macnaghten & Gordon, 287.

<sup>3</sup> 3 Macnaghten & Gordon, 306.

<sup>2</sup> 2 Macnaghten & Gordon, 176, 181.

<sup>4</sup> 21 Law Journal N. S. C. P. 17 – 22.

<sup>5</sup> 20 Law Journal N. S. Chanc. 630.

<sup>6</sup> 1 Simons N. S. 165.

<sup>7</sup> 1 Simons N. S. at p. 174.

braces all partnerships, associations, and companies, having more than seven members."

[LORD BROUGHAM. — But must such a company be formed, or may it be merely a projected company?]

There is no difference in the applicability of the Winding-up Act on that account. The establishment of the projected company is as much the purpose of the association of men before the company is formed, as is the business of that company when the company has been actually established. The principle of law is older than the Winding-up Acts, for in *Lefroy v. Gore*,<sup>1</sup> Lord Chancellor Sugden held that a man was liable to contribute to his co-directors his share of a sum of money necessary for carrying on the concern, and declared that the amount of contribution of each director was to be ascertained by dividing the total loss by the number of directors who consented to act. That is all that is contended for here. All those who joined in the acts of the committee are liable. All who put their names on the committee, and consented to act, became responsible members of that body for all that was done. The Lord Chancellor there said:<sup>2</sup> "As to the test of liability, I think the case has been fairly put by Mr. Brewster, that in order to compel any particular defendant to contribute, it must be shown that he would have been liable to Mr. Vignoles [the person who had recovered the judgment in respect of which contribution was asked]. I agree that unless Vignoles could have maintained an action against the particular defendant, the plaintiff has no right to call on him for contribution. This, however, is a question which I shall have to consider when I come to speak of the liabilities of the several defendants. As regards the \* general \* 362 question, namely, the right to contribution, I must do the defendants the justice to say that they do not deny it; nor is there any doubt on the subject. It does not depend upon contract. The only contract here was between Vignoles and the provisional directors and officers of the intended company. But in case Vignoles proceeded on contract against one of the directors, there arose an equity, not upon contract, but out of the circumstances of the case, namely, that he should not, at his discretion, fix any one of the directors with the whole weight of the common obligation. Here the plaintiff, who was sued in England, could not plead the nonjoinder of the other directors, because they were not within the

<sup>1</sup> 1 Jones & La Touche, 571.

<sup>2</sup> 1 Jones & La Touche, 581.

jurisdiction of the Court ; but this Court will not permit the election of a creditor to prejudice the party against whom alone he has proceeded at law, but will make all those who are equally bound by the contract equally contribute to the loss. It was said, with a view to change the jurisdiction, that this equity may now be considered to arise upon an implied contract, upon this ground, that the equity having been for a long time administered, and it being now well understood that such is the law, there is an implied contract between the parties to do that which the law exacts, and that it is upon this ground relief at law is, in modern times, given between co-sureties. But though Courts of Law have assumed a jurisdiction they formerly disclaimed, the jurisdiction of equity remains untouched, and still enables it to administer substantial justice between all the parties bound by a common contract." The principles here laid down are directly applicable to this case, and show that this company may properly be made the subject of a proceeding under the Winding-up Acts.

*Mr. Cooper*, in reply. — It is not necessary to contend \*368 that this company was not \*intended to be a commercial or a trading company ; that may be so, but it is not an association at all, — it is a mere projected company, and an abortive scheme. Provisional registration does not make it a company, for that is an act which may be done by any one person, and may be done when there is no pretence for saying that a company has come into actual existence. *Nockels v. Crosby*<sup>1</sup> is a direct authority for the proposition that this scheme never was any thing more than a bare project, never carried into effect, or, in the words used by the Judges there, "the concern never was set a-going." In *Williams v. Pigott*,<sup>2</sup> it was decided that it was a question of fact for the jury, whether a provisional committee-man had authorised a committee of management to pledge his credit. That decision shows that there is no inferential liability in the case of a mere projected company. There was no intention in the legislature to make an alteration in the law to the effect of treating a scheme for a company as if it was a complete company, and thus altering all those decisions which had been understood previously to declare the law upon the subject.

<sup>1</sup> 3 Barnewall & Cresswell, 814.

<sup>2</sup> 2 Exch. 201.

**THE LORD CHANCELLOR.** — My Lords, — After the argument which your Lordships have heard, I propose to put a question to the learned Judges, coupled with a statement of the case, which will enable their Lordships to give the House an answer to the question whether a case such as that which has now been argued does or does not come within the Winding-up Acts. When your Lordships have taken the opinion of the Judges, you will then be enabled to dispose of the case at the bar, at least on the first point.

The question I propose to put is as follows: A railway company was projected and provisionally \* registered by the \* 364 promoters. A prospectus was published, containing a list of the provisional committee, which consisted of more than seven persons, appointed with their own consent; in which prospectus it was proposed to establish a railway company, with a capital of 2,000,000*l.*, in shares of 25*l.* each.

A meeting of more than seven of the persons whose names had been inserted in the prospectus as provisional committee-men was held, at which a provisional committee and also a managing committee were appointed, each consisting of more than seven persons, nominated with their own consent. At that meeting it was resolved to establish the company as proposed by the prospectus for constructing the railway therein mentioned, and to apply for an Act of Parliament to establish such company, and to procure the necessary plans, &c. for that purpose. Five thousand shares were allotted to different persons, in various numbers, but 500 only were accepted by the allottees. It was ultimately found to be impracticable to procure subscribers for a sufficient number of shares to enable the parties to carry the project into effect, and it was therefore, by an order under the Winding-up Acts, ordered that the company should be dissolved.

Are the provisions of those Acts applicable to this case?

The Judges requested time to answer the question, and on the 26th of June, —

**BARON PARKE** delivered their answer in the following terms: In answer to your Lordships' question, I have to state that we are of opinion that the persons who acted together, for the purpose of obtaining an Act of Parliament to make a railway in the

\* 365 manner therein stated, were a company \* or association within the meaning of the Joint Stock Companies Winding-up Acts, 1848 and 1849, and that the association of those persons may be dissolved and wound up under the direction of the Court of Chancery, if that Court shall consider that it is fit and proper that it should be so dealt with.

The first of these two Acts, 11 & 12 Vict. c. 45, reciting the previous Act of 7 & 8 Vict. c. 111, and the Irish Act, 8 & 9 Vict. c. 98, and the 9 & 10 Vict. c. 28, and the propriety of amending them, and giving further facilities for the dissolution and winding up of joint stock companies and partnerships, enacts that the Act shall apply to all companies, corporate or unincorporate, within the provisions of the *two* first-mentioned Acts; to other companies, not material to the present inquiry; and, lastly, to all companies, associations, and partnerships, to be formed after the passing of that Act, whereof the capital or the profits is or are divided, or to be divided into shares, and such shares are transferable without the express consent of all the copartners; and, by section 2, to all associations and companies formed for the purpose of working mines, and to benefit societies not certified and enrolled.

By the interpretation clause, the word "company" in the Act is to mean any partnership, association, or company, corporate or unincorporate, to which the Act applies.

The body of persons or association in question is not within the latter part of the first section above referred to, for it has no stock divisible into shares; whether it is within the former, 7 & 8 Vict. c. 111, is a more doubtful question. It clearly does not fall within the other Act referred to, for that is an Act confined to Ireland. The 7 & 8 Vict. c. 111, comprises in it various companies. It embraces commercial or trading companies incorporated; this is not one. But it also applies to any company or body of \* 366 persons \* associated together for commercial or trading purposes, to which privileges have been granted under 7 Wm. IV. & 1 Vict. c. 73, or which is registered provisionally or completely under 7 & 8 Vict. c. 110. Now this is not a company or body of persons associated together directly for commercial or trading purposes (if the making of a railway is such a purpose, which may be questioned); the immediate object of this association is not the making of a railway, but the obtaining an Act to enable them to do so, after subscriptions have been obtained, and

a company has been formed ; but as the Act speaks of such a body being provisionally registered as a condition, and a complete company practically never is, the probable meaning of the section is, that a body of persons associated to obtain an Act of Parliament to enable them to act as a company for commercial or trading purposes, whose ultimate, though not immediate, purpose is commercial or trading, is within this Act, and if so, it would be within the 11 & 12 Vict. c. 45, as that Act is expressly made applicable to every company within the provisions of the former Act, 7 & 8 Vict. c. 111.

If the question depended upon this company or association being within the 7 & 8 Vict. c. 111, we should have to decide whether the construction of a railway was a "commercial or trading purpose" ; but it is not necessary to do so. It is, however, material, as it seems to show that an association of promoters may be dealt with by the Court of Chancery for the purpose of being wound up, if their object is to form a company for commercial or trading purposes.

The Statute 9 & 10 Vict. c. 28, shows this more clearly. It provides that persons or companies who before that Act have entered into a subscription contract, or any other agreement or agreements in writing or otherwise, for the \* for- \* 367 mation of a company or partnership for making any railway, which cannot be carried into effect without obtaining the authority of Parliament, and in respect of which no Act had been obtained, it shall be lawful for such persons or companies to dissolve the company or partnership contract or agreement, whether or not such contract or agreement shall contain any provisions for the dissolution of the company or partnership intended to be thereby formed. The statute provides that it shall be lawful for the committee, provisional directors, or other persons, by such contract or agreement intrusted with the management or carrying on of the undertaking, to call a meeting to ascertain if the company shall be dissolved, and whether such dissolution shall be deemed an act of bankruptcy ; in which case the affairs of the company shall be wound up, under the provisions of the 7 & 8 Vict. c. 111 ; otherwise, as an ordinary partnership.

No such proceeding appears to have been taken in the case supposed in your Lordships' questions, and therefore that particular statute is not applicable to it.

But the statute shows that an undertaking by projectors to form a future company is capable of being dealt with under 7 & 8 Vict. c. 111, as a company, and may have its affairs wound up and settled by the Court of Chancery, under section 22 of that Act, if that Court shall think fit. It does not follow that every case of projectors of an intended company ought to be or would be so dealt with.

This statute was followed by the 11 & 12 Vict. c. 45, which extended the operation of the prior Winding-up Acts, and gave the Court of Chancery the power, on the application of a contributory, by petition to the Lord Chancellor or Master of the Rolls, to order the dissolution or winding up of the company or association therein referred to, not merely in case of bankruptcy, but in case  
 \* 368 \* of insolvency, or a judgment or decree against the company unpaid, or on a proceeding by a creditor of the company, or if any other matter or thing should be shown which, in the opinion of the Court, shall render it just and equitable that the company should be dissolved.

This statute, as has been before stated, does not in terms embrace this company, unless it is a company or body of persons formed for commercial or trading purposes under 7 & 8 Vict. c. 111, and it contains many provisions which are inapplicable, except to regularly formed companies.

In the case of provisional committees, or the projectors of a company, it is now perfectly well settled law, and acted upon in every court of law in Westminster Hall, that there is no partnership between them; no common power of binding each other merely by such a relation; each binds himself by his own acts only. There are, therefore, very few creditors of such a body collectively, though many of one, two, three, or more of the acting individuals who compose the committee, or are projectors; and so there may be a series of contracts to which there are different contributories, according as they have been authorised by different persons, very few binding all, and those only upon the rare accident of each individual authorising that particular contract.

These inchoate undertakings have generally no joint estate, effects, or credits, of which there can be a manager (11 & 12 Vict. c. 45, §§ 19, 20); no person can have a judgment or decree against the whole body, except in the rare case that all the projectors have jointly contracted; so that no proceedings could be taken under

that statute, section 5; nor are there any contributories of the entire company, except in the extraordinary case of all having contracted; for contributories are those only who have contracted by themselves or agents with a creditor, or who \* have \* 369 agreed to indemnify or repay, in part or in all, those who have contracted with the creditor on their own account. We consider the law to have been most correctly laid down by Lord Cranworth, in *Carrick's Case*, 1 Simons N. S. 509. All the questions of contributories resolve themselves into two simple questions of fact: 1st, by far the most frequent occurrence, did the alleged contributory make, or authorise to be made, the contract, in respect of which he is called on to contribute, on his account, jointly with others? or, 2dly, if any one or more entered into the contract in his own or their behalf, did he agree to indemnify the person or persons contracting in part or in all against the consequences of that contract?

The machinery of this Act, 11 & 12 Vict. c. 45, is undoubtedly not well adapted to such a case.

This statute was followed up by 12 & 13 Vict. c. 108, passed to amend the former. It is enacted, that notwithstanding any thing in that Act importing a more limited application thereof, the same shall apply to all partnerships, associations, and companies, whereof the partners or associates are not less than seven in number, whether incorporated or unincorporated.

This statute renders all liable, whether their purpose was commercial or not.

We think that the term "association" is applicable to such a body of persons as is described in your Lordships' question.

That body would, we think, have been within the 11 & 12 Vict. if its object had been commercial, the only question on that Act being whether a railroad fell within that description. The object of the 12 & 13 Vict. was to extend the former Acts, upon which a more limited construction was put. This body would clearly have fallen within the 9 & 10 Vict. c. 28.

\* We are of opinion, therefore, that it was meant to be \* 370 comprised in the class of "associations." It is perfectly true that some of the provisions in this statute, as well as the bulk of those under the former, are applicable only to partnerships and companies which have a joint stock capital and credits, whose members are united together with a common purpose of making



joint contracts, who for that purpose are bound by the agency of one another, or by that of one or more common agents, be they directors or officers, and who would necessarily become contributories bound by such joint contract.}

But though these provisions are inapplicable generally to the cases of projectors of different companies, there may be cases in which they or some of them are capable of being applied with advantage, entirely or partially; and we think it is for the Court of Chancery to decide, which it has undoubtedly a discretion to do (§ 12, 11 & 12 Vict. c. 45), on each application, whether the particular concern is one to which it will, under all the circumstances, be proper that the Act should be applied. We think this consideration affords an answer to an objection which appeared, at first sight, to present a formidable difficulty: that there are associations comprehended in those which we consider to be within the Winding-up Acts, in which there would be a great difficulty and inconvenience in applying the Acts. At the same time it may be observed that there are others in which they may with convenience be applied.

We answer your Lordships' question by stating that the proposed case is one to which the Winding-up Acts may be applied, if the Court think fit, not one to which the Court must apply them.

THE LORD CHANCELLOR. — The learned Judges have now \*371 given their opinion, in \*which, as at present advised, I entirely concur, that this is a case which may fall within the Winding-up Acts, if the Court of Chancery shall so think fit to apply those Acts. The great point in the opinion which has been delivered, in which I entirely concur, is, that, according to that opinion, every word in the Acts of Parliament in question must be construed according to its natural import; and though it is very difficult, I admit, to bring within the Acts some of the cases which are by this construction brought within them, yet it would be impossible to give the natural effect to the words of these Acts if you were to come to a contrary conclusion. The opinion, therefore, is one with which your Lordships will probably declare your entire concurrence. But as this case came before you on the merits, and as the point upon which the opinion of the Judges has now been delivered was merely preliminary, I should propose, as

I did in a former instance,<sup>1</sup> that your Lordships should adjourn the further consideration of the appeal, in order that it may be heard at your bar upon the merits; and when the argument on them shall have been concluded, you will, with the assistance which you have derived from the opinion just delivered, be enabled, without difficulty, to dispose of the case.

LORD BROUGHAM. — My Lords, I take it to be quite clear that the course now recommended to us is that which we ought to pursue. The argument at the bar upon the merits of the case was stopped, in order to obtain the opinion of the learned Judges on the question, whether we ought to go on with it at all; because the result would have been to stop the case, if the Judges had given an opinion, and we had been of \*opinion with \*372 them, that the case was not within the Act of Parliament.

Therefore, we waited until we saw whether or not that opinion would be given for or against the case being within the Act of Parliament, and whether or not we should agree with that opinion. The Judges are clearly and unanimously of opinion that the case is within the Act of Parliament; and I agree with my noble and learned friend, and with them on that point. I originally was of that opinion, two years ago, agreeing with Lord Cottenham. I own that I had afterwards some doubts on the subject. Those doubts the further consideration of the case, and also the opinion and arguments of the Judges, have tended to remove; and I am prepared to say that my opinion, as that of my noble and learned friends, agrees with the opinion of the Judges. But it is not necessary that we should now dispose of that point. It is quite sufficient for us to say that we see, at all events, good reason for going on with the rest of the case, anticipating, no doubt, that in all probability we shall ultimately agree with the opinion, that this case is within the Winding-up Acts.

June 28.

The Judges were again summoned, and Barons Parke and Alderson, Justices Coleridge, Maule, and Cresswell, Baron Platt, Justice Williams, Baron Martin, and Justice Crompton, attended. Justices Erle and Talfourd were also present during part of the argument.

<sup>1</sup> In the case of *Dimes v. The Grand Junction Canal Company*, in which the Judges delivered their opinions on the same day.

The Lord Chancellor presided. The other lords present during the argument were, Lords Brougham, Campbell, and Cranworth. Lord Truro heard the greater part of it, but left the House before its conclusion.

*Mr. C. P. Cooper (Mr. Morris was with him) for Bright.*—

\* 373 On the authority of the case of *Hutton v. Upfill*,<sup>1</sup> \* Bright was, in May, 1850, settled on the list of contributories, and the Master included him among those on whom a call of 10*l.* a share was made. Lord Cranworth confirmed what the Master had done. [LORD CRANWORTH. — It was desired that the decision of this House should be taken on the subject.] Bright had paid 262*l.* 10*s.* by way of deposit, and he now contends that he is not liable to make any further payment. It is doubtful, indeed, if he brought an action for such a purpose, whether he could not recover back his deposit, subject only to the payment of 2*s.* 6*d.* per share required under the Registration Act for preliminary expenses. He denies that he is liable to the payment of any call; but if liable, he contends that his liability is not that of an absolute kind, as of 10*l.* per share for each of his 100 shares, but only for that proportion which his 100 shares would bear to the 80,000 shares of which the company was to consist.

The first question to be considered is, whether there can be said to have been a partnership between Bright, in the character of a mere provisional committee-man and holder of allotted shares, and the managing committee; for all the expenses were incurred by the managing committee, and not by the provisional committee, of which alone he was a member. The first question seems to be answered by the cases of *Hutton v. Thompson*<sup>2</sup> and *Norris v. Cottle*,<sup>3</sup> in which it was considered that there was nothing in the nature of a partnership from the mere circumstance of a man being a provisional committee-man; and even the case of *Hutton v. Upfill*<sup>4</sup> did not proceed on any ground of partnership, for Lord Brougham there said:<sup>5</sup> “It is not, as I think, necessary to inquire whether or not this constituted a partnership”; and his

Lordship then goes on to state his opinion in a way which  
\* 374 shows \* that he deemed Upfill to be liable, because, by

<sup>1</sup> 2 House of Lords Cases, 674.

<sup>2</sup> 2 House of Lords Cases, 674.

<sup>3</sup> Ante, p. 161.

<sup>4</sup> 2 House of Lords Cases, 691.

<sup>5</sup> 2 House of Lords Cases, 647.

accepting shares when he was a provisional committee-man, "an authority might be implied from his acts"; treating the case as one which depended on contract, and deeming certain circumstances sufficient to constitute a contract. Lord Chancellor Cottonham, in the case of *Ex parte The Earl of Mansfield*,<sup>1</sup> adopted the same view, putting the liability of a member of the association not on the rule of partnership, but on his own acts, which held him out to the world as a person authorising the expenditure, and making himself liable for it.

The sum of 10,000*l.* is all that the managing committee was entitled to spend; and that sum is what might have been raised by the statutory payment of 2*s.* 6*d.* per share on the 80,000 shares; and Bright fully paid his portion of it. The 23d section of the 7 & 8 Vict. c. 110, states the powers which may be exercised when the company is provisionally registered. The managing committee here took on itself powers neither given by the statute nor by the act of the subscribers. It expended money to a larger amount than the statute authorised, and it increased the number of its own members. The latter is a most important act, since, in all these companies, the members at large select the managing committee for particular reasons, and are entitled to have their affairs managed by those alone whom they have thus selected. It may fairly be argued that, if liability was to follow as a consequence of delegation of authority, that ground of liability fails when there are acts done in excess of that authority. Then, as to the expenditure of money, it is clear, from this section, that on provisional registration the promoters could only recover 2*s.* 6*d.* per share on the shares of the company; but the argument on the other side must be, that though only \*allowed by law to \*375 receive that amount, they might expend a much larger sum, and bind the allottees to discharge the liability thus incurred. No such evasion of the provisions of the statute can be allowed.

The real test of liability is, whether an action at law could be maintained against the contributory (*Lefroy v. Gore*)<sup>2</sup> for the debts in respect of which he is called on to contribute. In such an action the first question would be, whether there was any authority, express or implied, to contract the debt. In that way, each debt would have to be the subject of a separate discussion;

<sup>1</sup> 2 Macnaghten & Gordon, 57.

<sup>2</sup> 1 Jones & La Touche, 571 - 581.

but if so, there can be no liability in respect of the mere relation of shareholder and managing committee.

The order appealed against cannot be supported, even as an order for making Bright liable for costs on the winding up of the company; for what Lord Cranworth said in *Hunter's Case*<sup>1</sup> is applicable here, and the Court cannot deal with this question of costs until it has settled the question of the liability of the contributories among themselves, or till the Master has ascertained their proportion of liability to the costs, in respect of which the call is made. When found to be liable, they are not necessarily liable in proportion to the number of their shares; their liability must depend on the particular circumstances of the case. This was declared by Lord Cottenham to be so with respect to the payment of losses, *Ex parte the Earl of Mansfield*; <sup>2</sup> and the principle there stated must govern the present case.

If there was no partnership here, then no implied liability can exist; and the facts show that no authority was really given by

Bright to the managing committee. All that he knew was,

\*376 that the capital of the company was to consist \* of 80,000

shares, and that he took only 100 of these shares; he could not, therefore, be supposed to know that his proportion of liability would exceed that of 100 as compared to 80,000 and the statutory payment of 2s. 6d. per share on these 80,000 shares being sufficient to cover all the expenses that could be legally incurred, he is entitled, putting all these circumstances together, to have it presumed that he had not given even an implied authority to the committee to spend more than the statute authorised. Considered in this way, he has far more than satisfied his liability; but under no circumstances whatever can his liability extend beyond the amount of the deposit which he has already paid.

*Mr. Bethell* (with whom was *Mr. Roxburgh*) for Hutton, the official manager. — There are three points now submitted to the House, arising on the two appeals presented by these parties. First, it is said that, assuming Bright to be liable as a contributory, he is only liable to the amount which he has already paid. The second proposition is, that though he may be a contributory, he is only liable to contribute in the proportion which his shares bear to the whole amount of shares in the intended concern, — a pro-

<sup>1</sup> 1 Simons N. S. 435.

<sup>2</sup> 2 Macnaghten & Gordon, 57 – 67.

portion which it is contended is applicable, not only to his liability to the debts of the concern, but also to the costs of winding it up; and the third proposition is, that if not liable in this ratio, he is liable only in the sum of 2s. 6d. per share on the whole amount of shares agreed to be taken by him. On the other hand, the official manager contends that the Master was wrong in limiting the responsibility of Bright to the period between the 14th of October and the 30th of November, when the company, by being unable to comply with the standing orders of both Houses, became an abortive scheme; because he contends that, when once Bright \* had agreed to do that which made him a contributory, \* 377 and by his acting as a provisional committee-man had given an implied authority to the managing committee, he had embarked in the concern for good and for evil, and had become liable for what had been done, and what was intended to be done, by the committee.

There is no difference in the relative position of the different contributories, and their division into classes is therefore erroneous. They were all members of the provisional committee, and that which was called the managing committee was merely a section of the larger body. All of them were subject to the same liability, each being the holder of 100 shares; the question of proportionate liability as between them cannot, therefore, arise. What is the meaning of the word "contributory," as defined in the Statute 11 & 12 Vict. c. 45? It is, "Every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof." The argument on the other side cannot be maintained, except by confounding altogether the status of a contributory in this kind of association with that of a shareholder in a company completely formed, and so getting rid of the latter part of the clause. In truth, these things are entirely different. In a completely formed company, the members are distributed into ranks and degrees, as are the officers and crew of a well-regulated ship, and the various degrees of responsibility can be easily ascertained; but here the members are like so many persons all assembled in one boat, which is going to reach that ship, and having reached it, to establish degrees and ranks, but among whom there is at the moment no difference of rank or position. The provisional committee is the body which has the task to form the company, the members of it are the managing body of

\* 378 the association, and the absent are \* bound by those present, — the minority by the majority ; they are bound by the implied authority which such a state of things necessarily supposes.

What is this implication of authority ? It is a conclusion of fact, drawn by operation of law. Such is the principle on which this House has decided that a combination of two facts, the status of provisional committee-man and the acceptance of shares, has produced a conclusion of law ; namely, an implied authority given to the other members of the body to incur such expenses as were necessary for the formation of the company. This implied authority must extend to the acts of the managing committee. In fixing the date of the 30th of November as the moment at which this implied liability ceased, the Master committed an error ; for he assumed, without reason, that the liability ceased the moment it became apparent that the company could not legally be formed. That was not a reasonable construction ; for the authority being once given, must extend over all the time during which the acts necessary to be done under it were in a course of being performed, and could not cease at the moment when the doing of those acts was certain to become legally ineffective. But besides this, it is difficult to see why the liability of the provisional committee-man was to be limited at its commencement to the 14th of October ; for it is perfectly clear that the implied authority which was given was an authority, not only for the future, but for the past. How is any distinction to be made between them ? Suppose the company is provisionally registered on the 5th of August, and Bright becomes a committee-man on the 6th, and the managing committee, formed out of that provisional committee, and intrusted by it with the powers of management, meets shortly afterwards ? Surely, it cannot be said that, under such circumstances, he does not

\* 379 adopt all the contracts made by that committee. \* From the moment he accepted shares, he did adopt these contracts. Such is the necessary result of the decision of this House. The moment Bright accepted the shares, he completed, by implication, the measure of authority conferred on the acting branch of the provisional committee, and, retroactively, he became liable to the agents of the company for its past expenditure.

The committee of management, being what may be called a preliminary body, had already done certain things, and incurred cer-

tain liabilities, and made some necessary expenditure, in order to accomplish the end for which it was appointed; and any member admitted after these acts had been done, became, by adoption of the acts done, liable to the expenditure of the company thereby incurred; for it had been incurred for the benefit of that company of which he had thus become a member. The moment the individual became a member of this association, and under the Winding-up Acts, applied to the company by the Court, was declared to be a contributory, he became liable to all the engagements into which the association had entered. It is not necessary for the purpose of establishing his liability that a profit should have resulted to him. This point has been anticipated in the judgment in *Hutton v. Upfill*,<sup>1</sup> where it is said: "It is very possible that no profit might result to him; but if any gain had been made, he would have had his share, and he could not withdraw at his option from the liability which the holding this beneficial chance of profit imposed"; and, following up this line of argument, *Nockels v. Crosby*<sup>2</sup> and *Fox v. Clifton*<sup>3</sup> were remarked on, and it was said: "Neither of these cases decides that if several persons join in a plan to form a partnership, and one of them accepts a given portion of the \* stock, which would give him certain rights \* 380 were the partnership formed and in active operation, he can recover back money paid by him for necessary expenses in the parliamentary and provisional proceedings."

It is said that the liability can be no other than a legal liability. Such a liability is established here. On provisional registration, the promoters are entitled (7 & 8 Vict. c. 110, § 23) "to allot shares." [LORD CAMPBELL.—But the third section of the Act defines a "subscriber" to be "any person who shall have agreed in writing to take or have any shares in a proposed company."] But who are the promoters of a company? They are, according to the same section, "persons, acting by whatever name, in the forming and establishing of a company at any period prior to the company obtaining a certificate of complete registration." Now the case of *Hutton v. Upfill*<sup>4</sup> authorises the assertion, that a provisional committee-man who accepts shares is a person engaged in forming and establishing a company. If so, he is a promoter within the meaning of the Act. [LORD CAMPBELL.—But promo-

<sup>1</sup> 2 House of Lords Cases, 690.

<sup>2</sup> 6 Bingham, 776, and 9 Bingham, 115.

<sup>3</sup> 3 Barnewall & Cresswell, 814.

<sup>4</sup> 2 House of Lords Cases, 674.



ters and subscribers are two entirely distinct classes of persons. An allottee comes within the description of shareholder.] But an allottee who agrees to take shares, being at the same time a provisional committee-man, becomes thereby liable as a contributory. That must be taken as the starting-point of the argument. Such a person is a promoter. That is a word of most general import. Here the association is an association of promoters alone ; there never was, in fact, a company ; but, by virtue of the Act, the moment the provisional registration was accomplished, the promoters were entitled to call themselves by the name of the intended company.

\* 381 It is clear that the moment an individual takes shares \* and pays a deposit, that deposit becomes liable to meet antecedent engagements. It would be singular to say that the money was liable, but that the man, who in virtue of making a contract had paid that money in part performance of his contract, was not liable. There is no legal difficulty in the position that an individual may make himself liable on an already existing contract ; for subsequent ratification is equal to antecedent authority, and that ratification is to be found here. So that, if legal liability is the measure of equitable liability, which in a case like this is entirely denied, such liability could be established from the circumstances here.

By becoming shareholders, where a committee of management exists, persons authorise that committee to act for them ; and if it is asked in respect of what matters that authority is given, the answer is, in respect of all those matters detailed in the prospectus of the intended company, and mentioned in the 23d section of the Registration Act as constituting the business of the company, and the purposes to which the efforts of the promoters are to be directed. The body of promoters being from time to time capable of admitting new members, such members are, when admitted, in the same state and condition as the old, and are bound to participate in all existing liabilities.

Then comes the question, When does such a person become a promoter of the company ? The answer is given by the case of *Hutton v. Upfill*. The authority to incur expenses is presumed, and dates from the completion of the two acts there declared to be necessary to constitute a contributory's liability. [LORD CAMPBELL. — You have spoken of an equitable liability ; how do you

define it ?] It is, when an individual becomes a member of an existing body which has incurred liability for a common object, of which he may receive the benefit. If such an individual does not \* become liable at law, he becomes liable in equity. \* 382 [LORD CAMPBELL. — What is your definition of the equitable liability of a contributory ?] It is, an obligation to contribute to those contracts entered into by other persons, to the performance of which he would not be bound at law, but of which he receives the advantage, and is therefore bound in equity. [LORD CAMPBELL. — But if he authorises others to act for him, he is liable at law. Do you say that equitable liability is to be answerable for that which he did not authorise ?] This party became liable at law by his acts, and by the maxims of law which make those acts a ratification of what had been before done ; but if not, then he is liable in equity, by reason of becoming associated in a concern which had made some progress towards its object, and to the advantages of which he would become entitled on becoming associated with it. [LORD CAMPBELL. — That is, he is bound in honor.] No, he is bound by force of the claim he makes to share the advantages obtained through acts already done. There is no difficulty in understanding this in equity. Suppose A. B. and C. are the first promoters of a scheme, and they enter into contracts, and then E. and F. join them, the last two persons thereby adopt the contracts, and become liable at law ; but if not liable at law, they are liable in equity, on account of the benefits they will receive from these contracts. At all events, if not liable to the creditors of the concern they are liable as between themselves and their partners, and so would be contributories.

These are the principles on which this case ought to be decided, and on which it must be decided, against the appellant Bright. There is one case which, except that it does not go so far as to declare that a promoter is liable for all antecedent expenses, seems exactly in point with the present ; it is that of *Ex parte Dale, In Re the Wolverhampton, Chester, and Birkenhead Junction Railway \* Company*,<sup>1</sup> — a case which occurred before the Lords \* 383 Justices. The Master charged with the winding up of a provisionally registered company, of which there was no deed of settlement, found by his report, first that the only contributories consisted of a number of persons who, on the same day, being

<sup>1</sup> 16 Jurist, 207, 21 Law Journal N. S. Chanc. 341.

members of the provisional and managing committees, each took the same number of shares in the concern, and thereby rendered themselves liable equally to the expenses incurred from that time in launching the concern ; secondly, the amount of the expenses so incurred, and the fact that the whole, or nearly the whole, of those expenses had been discharged in unequal proportions by the contributories ; and, thirdly, according to the best estimate he could form, the costs of the winding up. To meet the whole amount thus ascertained, he made a call of a particular sum upon each contributory, giving credit to each against such call for any contribution he might already have paid towards the liquidation of such expenses. The Lords Justices, following *Upfill's Case*, 2 House of Lords Cases, 674, held that, regardless of the question whether the liabilities in respect of the expenses were all liquidated or not, each contributory was liable to pay the call so made, and it was also held, that the principle on which the Master had proceeded in making the call was correct. That case cannot be supported, if Bright is not here held to be liable.

As to the liability of the contributory to the costs and expenses, that matter has been fully and properly settled by the Master in the present case ; for the Master has here done what Lord Cranworth, in *Upfill's Case*,<sup>1</sup> when it came a second time before him, and in *Hunter's Case*,<sup>2</sup> declared necessary to be done. The liability of the contributory to the discharge of the debts in respect of  
 \* 384 which the call is made has been ascertained, and the call is, therefore, good as to the costs.

*Mr. Cooper*, in reply. — The case of *Hutton v. Upfill*<sup>3</sup> has been, throughout the argument on the other side, assumed to be a decisive authority ; whereas the doctrine in that case is the very topic now under discussion. If Bright is liable to any extent, it is not by the bare union of two characters, but by some act which he has done, and which constitutes him a contractor. No such act has been done here.

There is no such thing as an equitable liability distinct from, if not opposed to, a legal liability. The measure of the liability is legal. *Lefroy v. Gore*.<sup>4</sup> The case of *Walstab v. Spottiswoode*<sup>5</sup> shows

<sup>1</sup> 1 Simons N. S. 395.

<sup>4</sup> 1 Jones & La Touche 571.

<sup>2</sup> 1 Simons N. S. 435.

<sup>5</sup> 15 Meeson & Welsby, 501.

<sup>3</sup> 2 House of Lords Cases, 674.

that it is a gross violation of duty on the part of a committee of management to expend a large sum of money before the shares are subscribed for, and the deposits paid. No implied liability can arise against the person towards whom this violation of duty has been perpetrated.

It is impossible that Bright can be held liable for any expenses incurred before the 14th of October; for till then he held only one of those characters, the combination of which, even according to *Hutton v. Upfill*, must exist in order to make him liable.

There can be no such thing as implied authority here, on which to make Bright liable to contribute; for if there was, then suppose one of these other persons had paid the 10,000*l.* called for by the Master, would he thereby be at liberty to call on Bright to repay him half? If so, Bright could, in like manner, call on any other person similarly situated, and there would be an endless multiplicity of \*actions. Neither law here nor anywhere \*385 else can encourage or even allow such a state of things.

THE LORD CHANCELLOR. — I propose, after stating the facts of this case, to put a question to the Judges.

His Lordship then stated the facts in the following form: —

“In the year 1845, a railway company was provisionally registered, pursuant to the Statute 7 & 8 Vict. c. 110, intituled ‘An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies’; an Act of Parliament was necessary to authorise the formation of the company, and the carrying into effect its objects.

“The capital of the proposed company was to be 1,000,000*l.*, divided into 40,000 shares of 25*l.* each; upon each of which shares it was proposed that a deposit should be paid upon the allotment thereof.

“A prospectus, registered 25th September, 1845, was printed, published, and circulated amongst the public by the promoters of the said company, containing the names of divers persons, and amongst others that of A., as the provisional committee of the said company.

“On the 8th of October, 1845, a meeting of gentlemen was held at the office of the said company, at which a provisional committee, of which A. was one, and also a committee of manage-

ment, of which A. was not a member, were appointed, and resolutions passed to the following effect: viz. that the prospectus issued as that of the provisional committee then read should be approved and adopted; and, until an Act of Parliament should be obtained, the affairs of the company should be under the control of the managing directors, to whom power was given to allot the shares, and to apply the funds of the company in payment  
 \*386 of all the \*expenses incurred in its formation, and in the preparation of the plans and sections to be submitted to Parliament.

“A. was not present at the meeting of the 8th of October, 1845; but it is stated in the report of the official manager, that it appears from the books of the company that a copy of the proceedings and resolutions at that meeting was forwarded to each of the members of the provisional committee.

“On or about the 14th of October, 1845, A. received from the secretary of the proposed company a circular letter of the 10th of October, informing him that 100 shares had been appropriated to each member of the provisional committee; and on the 14th of October, 1845, A. wrote to the said secretary a letter in reply to the said circular, stating that he was willing to take the 100 shares placed at his disposal as a member of the provisional committee. On the 18th of October, 1845, the said secretary sent A. the letter of allotment of 100 shares to him, and he paid the deposit on 100 shares allotted to him by the said letter of allotment; but he has paid no further sum on account of the said company.

“Thirty thousand shares only, of the 40,000 of which the said company were to consist, were allotted; the deposits were paid on 3000 only; no Act of Parliament was ever applied for to invest the said company with the powers necessary to accomplish its object, and the undertaking was wholly abandoned.

“The managing committee accepted and took upon themselves the office and duties thereof, and expenses to a large amount were incurred by them in and about the formation of the company, but A. did not authorise the incurring of any such expenses, nor was he present at any meeting of the said company.”

\*387 \*I then propose, my Lords, to ask the Judges the following question:—

“Do the facts above stated afford sufficient evidence at law to warrant a verdict that A. is liable to a creditor, on the employ-

ment of the managing directors, for work done necessary for obtaining the Act of Parliament ? ”

The Judges retired to consider the question, and on their return,

BARON PARKE delivered their unanimous opinion. After repeating the facts as set forth in the question, the learned Baron said : —

All her Majesty's Judges who have heard the argument are of opinion that, but for the decision of your Lordships' House in *Hutton v. Upfill*, the facts above stated would not have warranted a verdict that A. is liable to a creditor, on the employment of the managing directors, for work done necessary for obtaining the Act of Parliament.

We consider that *Upfill's Case* decided two points : first, of law, that similar evidence was such as was fit to be considered by a jury in determining the question of fact that he was liable on the ground of having given authority, and therefore would have warranted a verdict against him ; secondly, it decided the question of fact, that Mr. Upfill had given the authority. Upon the former point, we consider your Lordships' decision to be binding upon every inferior Court, and for that reason answer the question in the affirmative ; but for that case, we, upon other decisions, should have been of a contrary opinion.

THE LORD CHANCELLOR. — My Lords, in this case, in which you have just heard the opinion of the learned Judges, a question of great importance remains to be decided. It is, whether, under the \* facts stated, Mr. Bright was or was not liable \*388 to pay as a contributory. He paid his deposit ; with regard to that, no question was asked of the Judges. The question was as to his further liability. He was a provisional committee-man, and he had shares allotted to him, and those shares he accepted, and on them he paid a deposit ; but he did no further act.

Now I understand the Judges to be of opinion that, independently of *Upfill's Case*, there was nothing arising out of those facts which would have made Mr. Bright liable to a creditor for business managed, carried on, or ordered by the managing committee towards completing the projected undertaking, and converting the association into a regular company.

My Lords, *Upfill's Case* may be considered, as the Judges have considered it, as a mixed case of law and fact; and, therefore, may not be so difficult to deal with as it might otherwise have been. At the same time, I should venture to state, as my opinion, that although you are bound by your own decisions as much as any Court would be bound, so that you could not reverse your own decision in a particular case, yet you are not bound by any rule of law which you may lay down, if upon a subsequent occasion you should find reason to differ from that rule; that is, that this House, like every Court of Justice, possesses an inherent power to correct an error into which it may have fallen.

In regard to the point decided in *Upfill's Case*, I must state to your Lordships that I believe there is scarcely one Judge who has been called upon to decide this question — and every Court has been resorted to — who has not differed from himself in regard to the points decided. There was so much of novelty in the establishment of a provisional committee, there was so little of  
 \*389 law to direct the opinions \* of the lawyers upon it, and there was such a leaning in favour of a *quasi* partnership and an implied responsibility, that I am sure your Lordships will not be surprised if, in *Upfill's Case*, as in many others I could quote, there may have been a departure from that which is now considered to be the settled rule.

I believe the general opinion now is, that the answer which has been given by the learned Judges is that which your Lordships ought to follow; namely, that Mr. Bright in this case would not be liable to an action. If you follow that rule, leaving *Upfill's Case*, as depending upon a matter both of fact and law, just where you found it, you will decide this case upon the facts existing here, and upon the question submitted on those facts to the learned Judges; and on them you will give your judgment.

I should therefore propose, without going further into detail (after the opinion just delivered), that your Lordships should dismiss the appeal of the official manager, requiring Bright to pay a larger sum than he has hitherto been charged with, and should reverse the order of the Court below, which holds him to be liable to contribute to the call of 10*l*. The consequence of reversing the one and dismissing the other would be, that Mr. Bright would from this time be held not liable to any contribution in this company beyond the deposit which he actually paid.

LORD BROUGHAM.—When I advised your Lordships in *Upfill's Case*, I had the concurrence of a very high authority, the late noble and learned Lord Cottenham, who not only went entirely with me in the advice that I tendered to your Lordships, and which you were pleased to accept in that case, but went a great deal further, as I stated at the time.<sup>1</sup> I either \* read or \* 390 had in my hand a letter from Lord Cottenham on the subject, in which he certainly went a good deal further than I was disposed to go, in admitting the liability of a party in similar circumstances. I therefore felt no hesitation whatever in the conclusion which I myself arrived at in *Upfill's Case*, and which I advised your Lordships to adopt.

Whether I should have altered that opinion now, had I considered the question open, it would indeed be superfluous at present for me to say. The learned Judges, to whom the question has been submitted, have given a unanimous, and I believe I may say an unhesitating, opinion, that this question, which they say is partly a question of law and partly of fact, but which, in my opinion, is a great deal more a question of fact than it is a question of law,—they have given their opinion upon that to the extent that the evidence of a man being a provisional committee-man, and of his having shares allotted to him by his own consent,—indeed, at his request,—would not be sufficient to warrant a verdict in an action at law, brought against him for monies expended by the managing committee in that concern. The learned Judges have given this opinion. It is not for me to say whether I agree with them or not. It would be superfluous in me to say I agree with them; it would be unbecoming in me to say that I differ from them. It is enough for me to say that I entirely approve of the course recommended, under the circumstances, by my noble and learned friend on the woolsack; namely, the affirmance of one appeal and the reversal of the other.

LORD CAMPBELL.—My Lords, I rejoice very much that this matter of the liability of contributories is now put upon what I think is its right footing.

\* I never could understand why it was considered a pure \* 391 question of law; why provisional committee-men and allottees of shares—persons who stood in both capacities—were, on

<sup>1</sup> Hutton v. Upfill, 2 House of Lords Cases, 694.



that account, to be liable as contributories. The law does not know what is the meaning of provisional committee-men. Yet they have been talked of in our Courts; their liabilities have been considered and dealt with, and their powers made the subject of discussion, and their liabilities treated of as arising from their powers, as if they were as well known to the law as tenants for life or tenants in tail.

I consider this is a matter of contract. A person can become liable as a contributory in respect of the contract he has entered into, not in respect of assuming a particular character. The question of contract will depend upon the facts of the case, not merely on the party being a provisional committee-man; and then the only question of law will be, whether there is evidence to submit to the jury to consider whether a contract has been proved; for whether it has or has not, is matter of fact, and to be decided as matter of fact.

Now I say that I entirely concur with the opinion delivered by her Majesty's Judges; and I think that, in this case, the evidence is not sufficient to fix the liability of Bright, and that if it had been laid before a jury, that the plaintiff ought to have been nonsuited.

A difficulty arises here from *Upfill's Case*; and, if I considered that that case was expressly in point, I must say, with the most sincere respect for the opinion of my noble and learned friend on the woolsack, I should hesitate in advising your Lordships to decide against it; because, according to the impression upon my mind, a decision of this high Court, in point of law, is conclusive upon the House itself, as well as upon all inferior tribunals. I

consider it the constitutional mode in which the law is \* 392 declared, and that, \* after such a judgment has been pronounced, it can only be altered by an Act of the legislature. My humble opinion is, that this House cannot decide something as law to-day and decide differently the same thing as law to-morrow; because that would leave the inferior tribunals and the rights of the Queen's subjects in a state of uncertainty; and after there has been a solemn judgment of this House, laying down any position as law, I apprehend that that is binding upon the rights and liabilities of the Queen's subjects until it is altered by an Act of the Commons, the Lords, and the Sovereign on the throne. That is my present impression, though I state it with great defer-

ence, after a different opinion has been expressed by my noble and learned friend on the woolsack.

I do not think that I am precluded from concurring in the motion that has been made in this case, because I do not consider *Upfill's Case* as laying down any abstract point of law. It was an appeal from a Court of Equity: your Lordships sat as a Court of Equity to decide it. You took into view the facts and the law, and I consider that what was laid down by my noble and learned friend, with the concurrence of that illustrious Judge, Lord Cottenham, when he talked of the liability of the committee-man, was stating his opinion upon a fact, and not his opinion upon an abstract point of law. But I do not think that *Upfill's Case* prevents us from concurring in the motion of my noble and learned friend, and, therefore, in that motion I entirely concur.

LORD CRANWORTH. — The question now before your Lordships is, in fact, an appeal from an order made by myself. But, as I stated in the course of the argument, although the order was made by myself, it was made by the consent and at the \*suggestion, or at the instance, of the learned counsel, that \*393 I should affirm simply what the Master had done, in order that the question might be brought by way of appeal to your Lordships' House. I believe, however, that upon that occasion — certainly, if not upon that, upon a great many similar occasions, in cases which were argued before me as Vice-Chancellor — I expressed my very strong doubts whether *Upfill's Case* could have been rightly considered, or rather rightly interpreted, by the profession; or, if so interpreted, whether it was a decision which could be acted upon. What was thought was, that *Upfill's Case* had decided, as matter of law, that persons under certain circumstances, namely, persons who, being members of a provisional committee, agreed to take shares in the projected company, necessarily became liable, in point of fact, to whatever demands might be lawfully made on the acting members of the committee. Now it appeared to me impossible that that could have been the intention of the House; that this House could have intended to decide that such a combination of circumstances necessarily rendered a person liable in point of fact to any thing. The decision, however, was so interpreted; and being so interpreted, I acted on it.

I rejoice that the matter has been brought before the House,

because I cannot help thinking that the opinion that has been now delivered unanimously by the Judges, in such very clear and distinct terms, will go far to settle doubts that have created enormous expense, and anxiety beyond measure, in the winding up of those several abortive companies.

I concur with my noble and learned friends in not thinking that we need treat this case as necessarily at variance with *Upfill's Case*, because *Upfill's Case* was a mixed decision of law and fact.

I confess that, treating it as a question of fact, the conclusion \* 394 at which your Lordships arrived was not that to which I should have arrived if I had then had the honor of a seat in your Lordships' House. The decision come to was on a case which was an appeal both from law and fact. Your Lordships decided that Upfill was properly put upon the list of contributories. I confess I think that that was an erroneous decision in point of fact. But be that as it may, the opinion now delivered by the Judges seems to me to set us free to do that which is just between the parties now before us. The Judges are of opinion distinctly, that, but for that decision, there was nothing here on which the case could be left to a jury to say whether Mr. Bright was or was not responsible. If he was not responsible had the matter been brought before a jury, he was clearly not responsible in equity.

I think it necessary to advert to one of the arguments addressed to your Lordships from the bar, viz. that although not responsible at law, he might be in equity. I know of no such distinction. He was liable, if at all, by virtue of a contract. If there was no contract, he was not liable at all; if there was a contract, he was liable both at law and in equity. The decision of the Judges leads clearly to the inference that he was not liable at law; in other words, that there was no contract, and if so, he was not liable in equity. The result will be, as my noble and learned friend on the woolsack has moved, that one appeal, the appeal of the party complaining of the order that was to make him liable, will be allowed, and the order appealed against be reversed. On the other hand, the appeal which seeks to render the party liable to a greater extent than he was held liable below, will be dismissed.

Bright v. Hutton : — *Order complained of reversed.*

Hutton v. Bright : — *Appeal dismissed.*

## \* BARRETT v. LONG.

\* 395

1851. February 18; June 2.

RICHARD BARRETT, *Plaintiff in error.*WILLIAM LONG, *Defendant in error.*

*Libel. Innuendo. Malice. Pleading. Evidence. Challenge of Juryman.*

In an action for a libel in a Dublin newspaper, the first count, after the usual prefatory averments, proceeded thus: "What possessed Lord H. (meaning thereby the said Lord Lieutenant of Ireland), if he knew any thing about the country, or was not under the spell of vile and treacherous influence, to make his first visit, and that carefully puffed, to Long's, the coachmaker (meaning thereby the said plaintiff), the other day? If mere trade was his (meaning thereby the said Lord Lieutenant's) object, he had several respectable houses open to him (meaning thereby that the house and place of business of the said plaintiff was not respectable, and that the said visit was paid thereto for political objects)": —

*Held*, that the innuendo did not enlarge the sense of these words, which were fully capable of the meaning given to them.

The third count repeated the same words, and accompanied them with the following innuendo: " (meaning thereby, that the house of business of the said plaintiff was not a respectable house in the trade, and that the plaintiff himself was of such a character, that he would not be visited in the way of his trade and business except from some political, or party, or other improper motive) ":

*Held*, that the words were capable of the meaning thus attributed to them; but that if the innuendo was more extensive than the words, it might be rejected as repugnant and void, and that the words, being libellous, were actionable without its aid.

In an action of libel, the defendant pleaded the general issue, and also a plea under the 6 & 7 Vict. c. 96, denying actual malice, and stating an apology. On the trial, the plaintiff, in order to prove malice, tendered in evidence other publications of the defendant, going back above six years before the publication complained of: —

*Held*, that these publications were admissible in evidence.

A town councillor is, by the 3 & 4 Vict. c. 108, disqualified from being a special juryman. The name of a town councillor stood on a special jury-list after it had been reduced:

*Held*, that under the Irish Jury Act, 3 & 4 Wm. IV. c. 91, he was liable to challenge for this disqualification when about to be sworn.

\* The right of challenge against a juryman is a common law right, which \* 396 cannot be taken away except by the express terms of a statute, and *quære* whether it is taken away by the 3 & 4 Wm. IV. c. 91, except in cases where corporate bodies are parties, and kindred or affinity with a member of the corporate body is the ground of challenge.

It is not taken away by the effect of the 3 & 4 Wm. IV. c. 91, in respect of a disqualification created since that statute.

Where a challenge in respect of such disqualification was made after reducing a special jury, it was held not to be necessary to allege that the disqualification had arisen since the jury was reduced.

THE writ of error in this case was brought to reverse a judgment given in the Court of Common Pleas, in Ireland, and affirmed in the Court of Exchequer Chamber there.

The action was in the form of case, and was brought by William Long against Richard Barrett, for a libel published in the Pilot newspaper of the 19th day of August, 1844.

The declaration contained four counts, varying the mode in which the alleged libel was stated.

The first count, after stating that Long was a coachmaker, in Mary Street, Dublin, that in the way of his trade he had frequent dealings with persons of high character, without reference to politics, that, for a long time before, he had been a justice of the peace of the county of the city of Dublin, and had acted on the grand juries of the said county of the city, and as a special juror at *Nisi Prius* in Dublin, and that before the publication of the libel Lord Heytesbury, the then Lord Lieutenant of Ireland, had given him an order for a carriage, averred that Barrett, intending to injure him in said trade and business, and in his credit and reputation, and to prevent persons from dealing with him, especially members of her  
 \* 397 Majesty's executive in Ireland, \* published in the Pilot newspaper of and concerning him, and of and concerning him in the way of his trade, the following libel: "What possessed Lord Heytesbury (meaning thereby the said Lord Lieutenant of Ireland), if he knew any thing about the country, or was not under the spell of vile and treacherous influence, to make his first visit, and that carefully puffed, to Long's, the coachmaker (meaning thereby the said plaintiff), the other day; if mere trade was his (meaning thereby the said Lord Lieutenant's) object, he (meaning thereby the said Lord Lieutenant) had several respectable houses open to him (meaning thereby that the house and place of business of the said plaintiff was not respectable, and that the said visit was paid thereto for political objects); but Long (meaning thereby the plaintiff) was a noted juror of the sort much wanted (meaning thereby that the plaintiff was known to be a person who had acted, and would act, dishonestly as a juryman); Long (meaning thereby the

plaintiff) was a feeble, talentless, vulgar, as a matter of course, but very virulent, member of the old exploded corporation of Dublin ; not one of whose members has ever yet been returned, even by the Conservatives, to the new corporation, and therefore it was that the Camarilla instigated their dupe and predestined victim (meaning thereby the said Lord Lieutenant) to go to Long's (meaning thereby the coachmaking establishment of the said plaintiff in Mary Street aforesaid), in order to commit him (meaning thereby the said Lord Lieutenant) still further with the people. We take a review of these passing events (meaning, amongst other events, the visit of the said Lord Lieutenant to the said establishment of the said plaintiff), trifling, perhaps, in themselves, but indicative of what are no trifles, that, at least, in going the high road of execration, Heytesbury (meaning thereby the said Lord Lieutenant) may see his \* way, and have no excuse that he erred \* 398 by accident or ignorance of the facts which indicate and influence injustice and misrule, and in their train public execration."

The second count averred that the defendant, intending to injure Long in his trade, business, and reputation, published the libel therein set forth of and concerning Long. It then set forth the libel stated in the first count, leaving out all the innuendoes, except those averring Long to be the person alluded to in the libel.

The third count was as follows: "And whereas Long, so being such coachmaker, and so exercising the said trade, as in the introductory part of this declaration mentioned, to wit, at Dublin, in the county of the city of Dublin, before the composing and publishing of the libel hereinafter next mentioned, had in the course of his trade and business received an order from the said Lord Lieutenant to supply the said Lord Lieutenant with a carriage, to wit, at Dublin aforesaid, in the county aforesaid ; yet the said defendant further contriving to injure the plaintiff in said trade and business, afterwards, to wit, on the 19th day of August, in the year of our Lord 1844, to wit, at Dublin aforesaid, in the county aforesaid, did falsely and maliciously compose and publish, and cause and procure to be composed and published, a certain other false, scandalous, malicious, and defamatory libel of and concerning the said plaintiff in his said trade and business, and of and concerning the said plaintiff, containing therein certain false, malicious, and libellous matter of and concerning him the said plaintiff, in his said

trade and business, as aforesaid, and of and concerning him the said plaintiff, to the tenor and effect following; that is to say, 'What possessed Lord Heytesbury, if he knew any thing about the country, or was not under the spell of vile and treacherous influence, to make his first visit, and that carefully puffed, to \*399 Long's, the \*coachmaker (meaning thereby to the plaintiff's), the other day; if mere trade was his object, he had several respectable houses open to him' (meaning thereby that the house of business of said plaintiff was not a respectable house in the trade, and that the plaintiff himself was of such a character, that he would not be visited in the way of his trade and business, except from some political, or party, or other improper motive)."

The fourth count stated that the defendant used the expressions "noted juror of the sort much wanted," for the purpose of expressing, and it was understood by the persons to whom the said libel was addressed to express and mean, a man who would act dishonestly as a juror, by giving a verdict from political and party motives, and not according to the evidence on which such verdict should be founded, and then set forth the libel to the words "of the sort much wanted," with appropriate innuendoes.

The defendant pleaded first the general issue, and secondly (under 6 & 7 Vict. c. '96, § 2), that the libels mentioned in the declaration were published by him, without actual malice or gross negligence, and that as soon as possible after the commencement of the action he published in the Pilot an apology.

Upon these pleas issue was joined, and the case came on for trial before the Lord Chief Justice, in the sittings after Hilary Term, 1845. Previously to the day of trial, an order for a special jury had been obtained, and a special jury struck; and on the list being called over at the trial, one person, John Pearson, when about being sworn, was challenged by the plaintiff, upon the ground that he was a town councillor of the borough of Dublin, and being so, that he was disqualified by law<sup>1</sup> from serving

\*400 on any \*jury within the county of the city of Dublin.

The defendant objected to the reception of this challenge,

<sup>1</sup> By the 3 & 4 Vict. c. 108, § 180, the Municipal Corporation Act for Ireland, it is enacted that, "After the time when this Act shall come into operation in any borough, every member of the council for the time being of the borough, &c., &c. shall be exempt and disqualified from serving on any jury summoned within such borough respectively, save and except the juries summoned for an assize or jail delivery."

contending that an objection of the nature relied upon in the challenge should have been made to the juror before the officer when the special jury was struck, and was not a ground of challenge;<sup>1</sup> but the Chief Justice declared it to be his opinion that the challenge ought to be received, and received it accordingly. To this ruling of the Chief Justice the defendant excepted. The defendant then joined issue on the challenge, alleging that "the said John Pearson is not now a member of the Town Council for the time being" of the borough of Dublin. Two triers were appointed, and \* they found "that the said John Pearson \* 401 was now a member of the Council for the time being of the borough of Dublin." The Chief Justice then allowed the challenge, and set aside the juror. To this ruling of the Chief Justice the defendant also excepted.

The trial then proceeded; and after proving the publication of the libel by Barrett, and making other formal proofs, Long produced certain numbers of the Pilot newspaper, bearing date respectively the 27th of January, 1834; 27th of March, 1835; 11th day of May, 1835; 27th day of May, 1835; 3d July, 1837; and 21st July, 1837, and proposed to read thereout various passages, in order to show that Barrett published the libel, the subject of the action, with malice towards the plaintiff.

To each of these publications Barrett objected, as being illegal evidence; but the Chief Justice admitted them as evidence of the defendant's motives in publishing the libel complained

<sup>1</sup> The 3 & 4 Wm. IV. c. 91 (Irish Juries), enacts, § 20: "That if any man shall be returned as a juror for the trial of any issue in any of the Courts hereinbefore mentioned, who shall not be qualified according to this Act, the want of such qualification shall be good cause of challenge, and he shall be discharged upon such challenge if the Court shall be satisfied as to the fact; and that if any man returned as a juror for the trial of any such issue shall be qualified in other respects according to this Act, the want of freehold shall not be accepted as good cause of challenge either by the Crown or by the party, nor as a cause for discharging the man so returned, upon his own application, any law, custom, or usage to the contrary notwithstanding: provided that nothing herein contained shall extend in any wise to any special juror."

The 23d section directs that the Court shall have power to order special juries to be struck before the proper officer, and enacts that "every jury so struck shall be the jury returned for the trial of such issue."

The 24th section declares who shall be liable and qualified to serve on special juries, and the 25th section gives very full directions as to the making up of the list of special jurors.



of; whereupon Barrett tendered a bill of exceptions to this ruling.

Evidence was given of the apology set forth in the plea, and the jury found a verdict for the plaintiff, with 150*l.* damages.

The bill of exceptions to the admission of the challenge, and to the evidence, was argued in the Court of Common Pleas, on the 29th of April, 1845, and again on the 5th of June, 1845, after which judgment was given for Long.

Upon this judgment a writ of error was brought in Trinity Term, 1845, to the Court of Exchequer Chamber, and in addition to the grounds relied upon below, it was contended by the defendant that the third count of the plaintiff's declaration was bad, and that the verdict and judgment being general, the judgment ought to be reversed.

The case was argued before nine Judges in the Court of \*402 \*Exchequer Chamber, in Hilary Term, 1846, and there being some difference of opinion among the Judges, a *new* argument was called for in Easter Term, 1846, before the full Court. After the second argument, the judgment for the plaintiff below was affirmed by a majority of Judges of that Court. The present writ of error was then brought.

The Judges were summoned, and Baron Parke, Baron Alderson, Mr. Justice Patteson, Mr. Justice Maule, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Williams, and Mr. Justice Talfourd attended.

*Mr. Bramwell*, for the plaintiff in error. — The first and third counts in this declaration are bad. The innuendoes in them are not warranted by the words of the alleged libel. These innuendoes are material, and cannot be rejected as surplusage; or, if they could be so rejected, there would be no defamatory matter in respect of which the action would be sustainable. In either view of the case, the judgment cannot be supported. The words set forth in the first count do not of themselves assert a want of respectability in Mr. Long as a coachmaker. Yet the innuendo alleges such to be their meaning, and charges the object of the libel to have been to injure Long in his trade and business. That is carrying the effect of an innuendo beyond the purpose for which the law allows it to be employed. In Williams's Saunders<sup>1</sup> it is said: "An in-

<sup>1</sup> Vol. I. p. 243, note 4 to *Craft v. Boite*.

nuendo is only explanatory of some matter already expressed ; it serves to point out where there is precedent matter, but never for a new charge ; it may apply what is already expressed, but cannot add, or enlarge, or change the sense of the previous words." Where, therefore, the innuendo is material, it must be justified by being explanatory of the defamatory words ; if not so, it is bad, \* and vitiates the count ; it can only be rejected as sur- \* 403 plusage when it has no materiality. Thus, if a declaration complained of a libel, alleging that the plaintiff had sent a threatening letter, an innuendo that it was a letter charging a nameless offence would be material, and could not be rejected as surplusage ; and, if not warranted by the words of the alleged libel, would be fatal to the count in which such innuendo was contained.

The innuendoes in the third count are likewise unwarranted by the words of the alleged libel, for there is no pretence for saying that Long is charged with not being a respectable tradesman,—respectable in the way of his business. The tenor of the paragraph really is, not that Long is not a respectable tradesman, but that he is a political partisan, on whom, for public reasons, it is desirable that the Lord Lieutenant should not personally call. Take the whole of the words of the alleged libel, and it is clear that they impute nothing against the trading respectability of Long, but that they impute the visit of the Lord Lieutenant to political purposes alone. Long is not assailed as a coachmaker, but as a partisan.

But it will be said that the words possibly bore this meaning, and that the jury having found that they did, the Court must assume the innuendoes to be proper ; that the truth of the statement, though it did not exist when the statement was made, has been since established by the verdict of the jury ; in other words, that the statement was improper at the time when the declaration and plea were put upon the record, but that the finding of the jury has since made it proper. Such a mode of trying the validity of a form of pleading is not admitted by the law. Words set out in a declaration cannot thus retrospectively revive a libellous meaning. Any words may be used with a libellous intent ; but that must be shown in a reasonable \* manner by proper \* 404 explanatory innuendoes in the declaration. The innuendoes must not extend their natural meaning, or give to the words a new meaning which they do not naturally bear. The words,

“there goes an honest man,” may be used to mean that the man is dishonest, and by proper innuendoes they may be shown to have that meaning; but it would not be sufficient in a declaration to quote these words, and then say, innuendo, “thereby meaning that he had committed felony and stolen sheep.” Nor, if this was done, could the verdict of a jury establish the propriety and fitness of such an innuendo.

The Court is always the judge of the legal sufficiency of the declaration. When the imputation is not in the mind of the utterer, but in that of the hearer alone, there is no good cause of action against the utterer. There must be something which justifies the assertion in the declaration that the words were used for a certain libellous purpose, and with a reasonable probability that they would be understood in a libellous sense. The cases of *Angle v. Alexander*<sup>1</sup> and *Boydell v. Jones*<sup>2</sup> are precise to that effect, and *McGregor v. Gregory*<sup>3</sup> shows that the defendant, in pleading, may deny the meaning thus affixed to the words. If so, then that meaning is a material part of the declaration, and if material, cannot be rejected as surplusage. As the innuendo here gives a meaning which cannot properly be attributed to the words, and that meaning is material to the maintenance of the action, it cannot be rejected. If it cannot be rejected, then the question arises whether it is an innuendo explanatory of the words; for if not, it is an innuendo improperly put on the record, and the count in which it is found thereby becomes unsustainable. If  
 \*405 either of the counts is bad on these objections, \* then the verdict, which was a general verdict on the whole declaration, cannot be sustained.

Then as to the challenge to the juryman. That was improperly allowed. It cannot now be contested, after the finding of the fact, that the juryman objected to was disqualified under the Irish Municipal Corporation Act. But the objection, assuming it to be valid, ought to have been taken at an earlier period. It does not appear that the juryman had become challengeable between the time of reducing the jury-list and the day of the trial. In fact, he had not; but if he had, that fact ought to have been specially alleged, and not being so alleged, it must be assumed that the objection made to him when he was called into the box was

<sup>1</sup> 7 Bingham, 119.

<sup>2</sup> 2 Dowling N. S. 769.

<sup>3</sup> 4 Meeson & Welsby, 446.

one which might have been made when the jury panel was reduced.

If so, then the objection to the juryman comes too late. A special juryman is not subject to challenge, like a common juror. The 25th section of the Irish Jury Act provides ample means for each party to know and to object to any person named as a juryman when the list is made out; and if no objection is then made, the right to make it is gone for ever. [LORD BROUGHAM. — I wish to know whether you contend that there cannot be, on any ground, an objection taken at the trial to a special juryman.] The argument must be carried to that extent. [LORD BROUGHAM. — Then suppose the jurymen were stricken with madness, must they still enter the jury-box? or, not to put so extreme a case, suppose that by devise or bequest, they should become, just before they were called into the box, owners of the property in dispute in the cause, and so be parties to it, — must they still be jurymen to try it?] The principle of the argument does not admit of an exception, even in such a case. It does seem difficult to contend for a proposition which is liable, even under extraordinary circumstances, \* to such an objection. But the difficulty thus \* 406 raised is not without remedy. There would be a power in the Court to interfere. [LORD BROUGHAM. — Ay, to put off the trial.] Certainly. But put the case in this way, and it will be clear that a challenge ought not to be allowed. There are forty-eight names on the panel. Each party strikes twelve; one of the parties takes good care to leave as many challengeable jurymen as he can. If he is afterwards to be allowed his challenges, he can thereby at any time prevent the trial taking place.

The question of the rule as to the time of challenging does not, however, necessarily arise here, for the pleading is defective in not showing that the objection to the jurymen arose after the time when the list was reduced. Even if the right to challenge exists, it must exist in virtue of some special matter arising after the reduction of the original panel; and that fact should have been pleaded. The other party is not bound to counterplead to a challenge thus defectively pleaded, but may object to the reception of the challenge. He did so here, and his objection ought to have been allowed.

The cases do not show that any such right to challenge a special juror exists, but they do prove that where there is a good ground

of objection, it should be taken before the time of the trial. *The King v. Sutton*.<sup>1</sup> In that case, a new trial was moved for, on the ground that one of the jurymen was an alien, and that this was not known to the defendant until after the trial. The rule was refused, on the ground that the defendant had had a previous opportunity of making his challenge; but Lord Tenterden, speaking of the English Jury Act, 6 Geo. IV. c. 50, the words of which are exactly followed by those of the Irish Act, 3 Wm. IV. c.

\* 407 91, said: "The proviso at the end of the \* 27th section appears to have the effect of taking away even this right of challenge in the case of a special juror; probably because the party has had an earlier opportunity of making the objection." In *The Queen v. Sullivan*,<sup>2</sup> it appeared that one of the special jury called to try the indictment had been one of the grand jury who found the bill. He himself, after the jury had been sworn and the case partly opened, stated the fact; but the Court would not allow that as a ground for a new trial, and in the course of the discussion Lord Denman spoke of the time of reducing the list as the proper time at which the objection ought to have been taken.

The last question relates to the admissibility in evidence of the articles selected from the newspaper, and published at periods between January, 1834, and August, 1844. These articles were not admissible on any issue raised on this record. The case of *Pearson v. Lemaitre*<sup>3</sup> does not warrant the course taken in the Court below; and yet that is the only case in which such a course of proceeding was allowed to be pursued. What is the principle that ought to have governed the Court? It is this, — that all the evidence should be relevant to the issues raised on the record. The first issue here was as to the fact of publication; the second, as to the signification of the words in the alleged libel; and the last, the amount of damages, supposing the first two issues to be found for the plaintiff. These paragraphs were tendered in evidence, solely for the purpose of increasing the damages, by showing the *animus* of the libeller. But a plaintiff is entitled to a compensation for the actual injury he sustains, and that compensation is not to be

either more or less on account of the *animus* with which the  
\* 408 publication \* was made. Malice is not necessary to make

<sup>1</sup> 8 Barnewall & Cresswell, 417.

<sup>2</sup> 1 Perry & Davison, 96, 8 Adolphus & Ellis, 831.

<sup>3</sup> 6 Scott N. R. 607, 5 Manning & Granger, 700.

a paragraph libellous. It may be published with a view to do a benefit to some one person ; but if it does an injury to another, that other is entitled to compensation. The circumstances attendant on the actual publication of a libel may perhaps be proved in evidence as part of the act complained of ; but other publications, at different and distant dates, cannot be adduced in order to show an *animus* in doing that act ; for such evidence is wholly irrelevant to the issues raised on the record. If *animus* is to be shown by the previous acts of the defendant, what are the acts which may be proved for this purpose ? where is the line to be drawn ? Is a plaintiff to be at liberty to prove that the defendant wantonly assaulted him, or commenced against him a vexatious lawsuit, or wilfully, after having been forbidden, hunted over his field ? No such evidence could be given even in an action for battery ; yet a blow is more or less insulting, according to the *animus* of the party who gives it, while the insult conveyed in a libel depends not on the *animus* of the party writing, but on the words he has employed.

Does the fact, that there was an issue here on the 6 & 7 Vict. c. 96, make any difference in this respect ? It does not ; for the only question here was as to the malice shown in this particular libel. The only evidence that these papers afford is, that Barrett was, according to law, the publisher of them, not that he had written or read them, or even knew their contents ; and the case of *Wakley v. Cooke*<sup>1</sup> established the distinction between the person who is merely civilly responsible for the publication, and the person who is morally responsible for it. The fact of the publication of a libel being brought home to a man by statutory means does not prove malice on his part. These \* papers were not admis- \* 409 sible in evidence in order to disprove the plea under the Statute 6 & 7 Vict. c. 96. This part of the bill of exceptions, therefore, remains unanswered, and the judgment on it ought to have been for the defendant in the Court below.

THE LORD CHANCELLOR. — The House will not trouble the counsel for the defendant in error on the subject of the objections to the first count, or on that of the admissibility of the evidence.

*Mr. Peacock and Mr. Hugh Hill*, for the defendant in error. —

<sup>1</sup> 4 Exch. 511.

The challenge to the juryman was properly admitted under the 3 & 4 Wm. IV. c. 91. Being a member of the town council, he was disqualified to act as a juryman. The 25th section of that statute is relied on by the other side ; but that section only contains a limitation of the time and place for striking the special jury, and does not refer to objections to the qualification of any particular juryman. There is no valid ground for objecting to a challenge to a special juryman ; but even if such objection could be taken, it has not been taken here in the proper form. *The King v. Edmonds*<sup>1</sup> is in point. In that case, the jurymen challenged were special jurymen, and there was no objection taken to the challenge on that account. There, too, it was held that the disallowing a challenge is not a ground for a new trial, but for a *venire de novo*, and every challenge must be propounded in such a way as that it may be put at the time upon the *Nisi Prius* record, so that the adverse party may demur, or counterplead, or deny the matter of challenge ; and, therefore, the ground of challenge in that \* 410 case not having been put upon the record, the \*defendants were held not entitled, as a matter of right, to ask the opinion of this Court upon their sufficiency. Both as to the right to challenge, and as to the form of objecting to the challenge, that case is an authority against the plaintiff in error.

There is a good reason for holding that the objection must appear on the record ; namely, that any Court of Error will then be able to decide whether the juryman was qualified ; but if the objection to qualification can only be taken at the time of striking the jury, the decision of the officer will be final, and in effect he will be placed above the Court. Such a result was never intended by the legislature. There are no means given by the 25th section satisfactorily to try the facts on an objection of this kind made before the officer of the Court. In bringing this objection to the juryman before the Court, it is sufficient for the objector to say that the person summoned is a town councillor, and in itself that is a valid objection to the juryman ; but if the other party means to contend that the mere fact of the officer putting the name on the list is a final decision of the matter, he should counterplead to that effect. Here the objection was not that the juryman was disqualified when the list was reduced, but that when he came into Court he was disqualified from acting as a juryman.

<sup>1</sup> 4 Barnewall & Alderson, 471.

The objection so stated is sufficient, and the issue was taken on that point alone. The case of *The Queen v. Sullivan*<sup>1</sup> does not apply to the present, for there the objection was not known to any one till after the juryman had been sworn, and the case partly opened. *The King v. Sutton*<sup>2</sup> merely decides that if the party has the opportunity to make an objection of this sort, and neglects to make it, he shall not afterwards be allowed to insist on it as a ground for a new trial, which impliedly \* shows that he \* 411 may make it at the time of the trial, though not for the first time after verdict.

The right of challenge is a common law right, Brooke's Abridgment,<sup>3</sup> and cannot be taken away but by the express provisions of a statute. Here the right is not so taken away, for the words of the Act referred to by Lord Tenterden, in *The King v. Sutton*, as taking away the right of challenge, are restricted to a want of qualification under that Act itself, and do not extend to other objections to the juror. Now here the disqualification was one created after the passing of the Irish Jury Act, and the challenge on account of that disqualification could not be taken away by the provisions of a statute passed before that disqualification existed. In this instance it was peculiarly proper to make the objection before the Court, and to take a judicial opinion upon it, for there had been, in a previous case in the Irish Courts,<sup>4</sup> a doubt entertained whether the fact of being a town councillor did operate as an absolute disqualification to a person sitting as a juryman on a trial at *Nisi Prius* in a city in which he held that office.

*Mr. Bramwell* replied.

THE LORD CHANCELLOR moved, and the House agreed to, certain questions to be put to the Judges, which having been put, the Judges asked and obtained time to answer them.

BARON PARKE.—The first question proposed by your Lordships for the \* opinion of her Majesty's Judges is, "In \* 412 a case between A. and B., would a declaration containing

<sup>1</sup> 8 Adolphus & Ellis, 831.

\* Tit. Challenge.

<sup>2</sup> 8 Barnewall & Cresswell, 417.

<sup>4</sup> O'Connor v. Mansfield. That case was brought up to this House and argued in the session of 1848; but no decision was ever pronounced. It was understood that the case had been settled or abandoned.



counts in the form hereunto subjoined be held in the Courts of Common Law to disclose sufficient causes of action? [His Lordship read the first and third counts, see ante, pp. 396—398.]

The second is, “If a declaration in an action of libel contains an innuendo which extends the meaning of the words in the libel, can the innuendo be rejected as surplusage, without prejudice to the question whether the matter complained of gives a cause of action?”

In answer to these questions, which it will be convenient to consider together, I have to state the unanimous opinion of the Judges who heard the argument at your Lordships’ bar, that a declaration containing the above-mentioned counts would be held in the Courts of Common Law to disclose sufficient causes of action, and to be good.

The alleged libels are capable of being understood, and that without the aid of any innuendo, to convey an imputation that the plaintiff’s house of business was not respectable, and, after a verdict for the plaintiff, must be so understood; and the alleged libel in the first count contains, besides, an unequivocal attack on the plaintiff’s character as a juryman and in other respects.

The principal objection to both counts as stated at your Lordships’ bar was, that the innuendo enlarges the sense of the words, and is therefore bad, and could not be rejected, and the counts therefore bad.

The innuendo in the first count does not appear to us to enlarge the sense of the words. That part of it which avers that the meaning of the alleged libel was, that the plaintiff’s house was not respectable, clearly does not enlarge or alter the sense of the words, which are fully capable of that meaning; and also the averment that the visit was paid for political objects is consistent with the context.

\* 413     \* But in the third count the innuendo does appear in part to enlarge or rather alter the sense of the words.

The words are capable of the meaning attributed to them, that the plaintiff’s house was not a respectable house; but it is very doubtful whether they can be construed as meaning that the plaintiff was of such a character that he would not be visited in the way of his trade or business, except from some political, or party, or other improper motive, because there is another alterna-

tive which the context suggests, viz. that it may have been through ignorance.

But if this be so, and that part of the innuendo is more extensive than the words will bear, and therefore unwarranted by them, we are of opinion that it may be rejected as repugnant and void; and the words are libellous, and therefore actionable, without its aid.

That an innuendo which is bad, and on the face of it repugnant to the words, may be rejected, was decided in the cases of *Corbet v. Hill*<sup>1</sup> and *Smith v. Cooker*;<sup>2</sup> and if the words are sufficient without the innuendo, the action is maintainable.<sup>3</sup> The same rule prevails where the innuendo unnecessarily introduces new matter, as in *Harvey v. French*.<sup>4</sup>

The case would be different, if the words are capable of two senses, and the innuendo ascribes one meaning to them, and is good on the face of it. *Williams v. Stott*<sup>5</sup> is an authority that in such a case it could not be rejected.

The third question proposed by your Lordships is, "In an action for a libel, when the plea of the general issue is pleaded, and also a plea under the Statute of 6 & 7 Vict. \*c. 96, \*414 denying actual malice, and stating the publication of an apology set forth in the plea, is it admissible upon a trial at *Nisi Prius* for the plaintiff to give evidence of other publications by the defendant (some of them more than six years before the publication complained of) of and concerning the plaintiff, in order to prove malice on the part of the defendant?"

We are all of opinion that under such a plea, the publication of previous libels on the plaintiff by the defendant is admissible evidence to show that the defendant wrote the libel in question with actual malice against the plaintiff. A long practice of libelling the plaintiff may show in the most satisfactory manner, that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less

<sup>1</sup> Cro. Eliz. 609.

<sup>4</sup> 1 Crompton & Meeson, 11.

<sup>2</sup> Cro. Car. 512.

<sup>5</sup> 1 Crompton & Meeson, 675, 687.

<sup>3</sup> See also *Roberts v. Camden*, 9 East, 93, cited by Parke B. in *Wakley v. Healey*, 7 C. B. 604, 605.

remote from the time of the publication of that in question, merely affects the weight, not the admissibility, of the evidence.

The fourth question proposed to her Majesty's Judges is, "If a special jury be regularly struck and reduced pursuant to the statutes, is it competent to either of the parties at *Nisi Prius* to challenge, under the Statute 3 & 4 Wm. IV. c. 91, a jurymen, upon the ground of his being disqualified as a town councillor under the Statute 3 & 4 Vict. c. 108, and would it be necessary that the challenge should allege that the disqualification had arisen since the jury had been reduced?"

We are unanimously of opinion that it is competent to either of the parties at *Nisi Prius*, to challenge, under the Statute 3 & 4 Wm. IV. c. 91, a jurymen, on the ground of his being disqualified as a town councillor under the Statute 3 & 4 Vict. c. 108.

\*415 \* That statute, § 180, provides that every member of the council for the time being of the borough shall be exempt and disqualified from serving on any jury summoned in such borough, save and except on the juries summoned for an assize or jail delivery. Under this section we have no doubt that a member of the town council is not merely exempted, but disqualified from serving on a jury. The terms of the Act are perfectly clear.

The common law mode of taking the objection to a juror, that he is disqualified, is by challenge; and the challenge must be allowed, unless taken away by some statute. In this case, the Irish Jury Act, 3 & 4 Wm. IV. c. 91, § 20, expressly recognises the right of challenge to a common juror for not being qualified according to that Act, and says nothing respecting a want of qualification under any other Act, or at common law. The disqualification, therefore, under 3 & 4 Vict. c. 108, is unquestionably a good cause of challenge to a common juror.

And in the case of a special jurymen, if the right of challenge is taken away in any case, except for collateral kindred or affinity with a member of a corporate body (which is expressly provided for by the 30th section), we are all clearly of opinion that the right of challenge is not taken away for a disqualification, not arising under the same, but a subsequent Act. It is said that the 20th section, expressly recognising the right to challenge a common juror not qualified according to that Act, and providing that nothing therein contained shall extend in any wise to

any special juror, impliedly takes away the right with respect to a special jurymen. But the right of challenge to a special jurymen in Ireland undoubtedly existed prior to the passing of 3 & 4 Wm. IV. c. 91, and is recognised by 17 & 18 Geo. III. c. 45, § 9, Irish, which provides that where a full special jury shall not appear, or, after appearance \* of a full jury, \* 416 by challenge of any of the parties, the issue is likely to remain untried by want of jurors, the Judge may command the sheriff to summon twelve others. And the 25th section of the 3 & 4 Wm. IV. provides that all matters whatsoever relating to special juries shall continue in force as heretofore, except when the same or any part thereof is expressly altered by this Act.

It may be questioned, therefore, whether the right of challenge in any case (except that for collateral kindred or affinity, which is expressly taken away) is taken away in the case of a special jury.

But whether it is or not, it is clear, in our opinion, that the parties are not deprived of it for a disqualification created under the subsequent Act of 3 & 4 Vict. c. 108; and therefore it is not necessary to allege in this case that the disqualification had arisen since the jury had been reduced.

THE LORD CHANCELLOR. — My Lords, we are greatly indebted to the learned Judges for the assistance which they have rendered to us in this case. I move your Lordships that the opinion which they have now given be printed.

LORD BROUGHAM. — My Lords, I entirely agree with the proposal of my noble and learned friend, that the opinion of the learned Judges in this case should be printed; and if we have any doubt upon it, that we should have an opportunity of considering it, both out of respect to the learned Judges, and with a view to the case itself. But except upon the point as to the challenge of the jurymen, my noble and learned friend and myself, even before the learned Judges were consulted, entertained very inconsiderable doubt, if, indeed, \* we felt any at all. That \* 417 point, from the peculiar circumstances of the case, involved some little difficulty, which required that the statutes should be looked into. The learned Judges have most ably, and with their usual industry and acuteness, rendered us the greatest assistance

upon our only point of difficulty. We are always under great obligations to the learned Judges, and in this instance, I believe, our minds are entirely satisfied with the reasons given. As no doubt, therefore, can any longer be entertained, I think we may dispose of this case at once; and I therefore move your Lordships, that the judgment of the House should be given for the defendant in error.

THE LORD CHANCELLOR concurred.

*Judgment for the defendant in error.*

1851. July 9, 11.

EDWIN WARD SCADDING, *Plaintiff in error.*

LOUIS LORANT, *Defendant in error.*

*Poor Rate. Vestry. Adjournment. Vestrymen de facto. Pleading.*

A rate for the relief of the poor, which is lawfully made in other respects, is not rendered invalid by the circumstance that some of the vestrymen, who concurred in making it, were vestrymen *de facto*, and not *de jure*.<sup>1</sup>

Where notice of the purpose of a vestry meeting has been duly given, and that meeting has begun but not completed a certain business, and the meeting is regularly adjourned, such business may lawfully be completed at the adjourned meeting, though the notice for summoning such adjourned meeting does not state the purpose for which it is summoned.

A vestry, duly assembled by notice for that purpose, on the 12th of August, resolved "That a rate of one shilling in the pound be made, and the same is hereby made and laid, and is to be collected forthwith." This resolution was signed by the requisite number of vestrymen; but one of the persons so acting was not at that time a vestryman *de jure*. The parish was so large that the estimate of the assessments required by the 6 & 7 Wm. IV. c. 96 (Parochial Assessments Act) could not be prepared and signed at that vestry. It was resolved "that the vestrymen be summoned for the 4th of September, to elect a director of the poor in the place of," &c., and the vestry then adjourned to the 4th of September. A special meeting of the vestry was held on the 28th of August, when the minutes of the last meeting were read and confirmed, and other business was transacted. On the 4th of September there was a general meeting of the vestrymen, pursuant to adjournment from the 12th of August,

<sup>1</sup> See *M'Mahon v. Lennard*, 6 House of Lords Cases, 970, 985.

when the minutes of the last vestry were read and confirmed, and the vestry was occupied with hearing applications from poor parishioners for relief from payment of the poor rate. This meeting adjourned to the 9th of September. On the 9th of September, another general meeting of the vestry was held, when the minutes of the last vestry were read and confirmed; the vestry was occupied as before, and adjourned to the 14th. On the 14th of September, the vestrymen again met, having received a summons; which, however, did not state the purpose of the intended meeting; and four \*volumes, \*419 arranged in continuous alphabetical order, like one book, were produced, containing the particulars of the assessment required by the 6 & 7 Wm. IV. c. 96, and the last of these books was duly signed, and the rate thus completed, was allowed by the justices:—

*Held*, that the rate thus made was a valid rate.

In replevin for seizing the plaintiff's goods under a distress for this rate, an avowry alleged that a poor rate had been made after the passing of a certain specified Local Act, and before the taking of the said goods, and whilst the property of the plaintiff was, and the plaintiff in respect thereof was, liable to be rated, to wit, on the 12th August, 1839:—

*Held*, that this was a good avowry, and was proved by the facts above stated.

THIS was an action of replevin. The declaration was in the ordinary form, and averred the taking and detaining of the goods and chattels of the plaintiff.

To this declaration the defendant made avowry, as one of the collectors of the poor rates of the parish of Saint Pancras, acting in execution of the warrant of distress mentioned in the latter part of the avowry.

The avowry stated, that the plaintiff was the occupier of two houses in the parish of Saint Pancras, Nos. 2 and 4 Gordon Street, and as such liable to be rated to the relief of the poor: that, after the passing of the Local Act, 59 Geo. III. c. 39, and whilst the property of the plaintiff, and the plaintiff in respect thereof, were liable to be rated, to wit, on the 12th day of August, in the year of our Lord 1839, a meeting of vestrymen of the parish was held in pursuance of the above Act, to wit, for the purpose of making one such general rate or assessment as by the laws then in force churchwardens and overseers of the poor then were enabled or empowered to make, as the said vestrymen, or any seven or more of them, should judge or determine to be necessary for the purposes specified: \*that more than seven, to wit, twenty- \*420 two vestrymen (whose names were set out) were then and there present at that meeting: that copies of notice of such meeting, and the purpose thereof, were duly affixed on the several

churches and chapels in the parish, duly signed : that a chairman was duly elected at such meeting in the absence of the vicar : that, at such meeting, a rate or assessment of one shilling in the pound was judged and determined to be necessary, and was then and there unanimously agreed upon and made, by all the vestrymen present at such last-mentioned meeting, upon all the property within the parish liable to be rated to the relief of the poor, and upon an estimate of the net annual value of the hereditaments rated, with deductions of annual cost of repairs, &c. : that such rate, in addition to every other particular which the form of making out such rate required to be set forth, contained an account of every particular set forth, at the head of the respective columns in the form given in the schedule annexed to the 6 & 7 Wm. IV. c. 96, so far as could be ascertained ; and which said rate or assessment then was such a general rate or assessment as, by the several laws then in force, churchwardens and overseers of the poor then were enabled or empowered to make : that after the making of the said rate, and before its allowance by two justices, to wit, on the 14th of September, in the year of our Lord 1839, a certain other meeting of the vestrymen was held, at which more than seven, to wit, thirteen vestrymen (whose names were specified) were present : that the vestrymen present at the meeting of the 12th of August having adjourned themselves to meet on the 14th of September, a printed notice of the said last-mentioned meeting so to be held by adjournment as aforesaid, with the name of the vestry clerk subjoined, was left at the usual place of abode of every vestryman, three days previous to the day appointed for such

\* 421 \* meeting : that at the said meeting a chairman was elected, and the said rate so agreed upon and made at the said first-mentioned meeting was then and there duly signed by eight vestrymen (whose names were set out) present at the last-mentioned meeting, and who had also been present at the said first-mentioned meeting, and at the time the said rate was so unanimously agreed to and made as aforesaid : that at the said last-mentioned meeting, after the signing of the said rate, and before the allowance by two justices afterwards mentioned, the same eight vestrymen signed the declaration required by the 6 & 7 Wm. IV. c. 96, to wit, at the foot of the said rate, — that is to say (a declaration in writing particularly described in the avowry) : that proper entries were made in the proper book of the names of all the vestrymen attending the

said meetings, and of all orders and proceedings at such meetings : that, after the making of the rate, and before the allowance by two justices, a special meeting of the vestrymen was summoned, and held on the 28th of August, in the year aforesaid, at which eighteen vestrymen (whose names were set forth) were present ; of which meeting and of the purpose thereof a printed notice, with the name of the vestry clerk subjoined, was left at the abode of each vestryman fourteen days previously : that such meeting was the next subsequent meeting to the first-mentioned meeting : that the said rate, so agreed upon and made at the said first-mentioned meeting, was then and there unanimously confirmed, and entry of such confirmation made in a proper book : that proper entries of the names of all the vestrymen attending the meeting, and of all proceedings at the meeting, had been made in a proper book. The avowry then stated the allowance and confirmation of the rate by two justices, and notice thereof on the church doors, and notice to the plaintiff of the premises. It then alleged the rating of the plaintiff, in the sum \* of 11*l.*, demand of payment, \*422 and refusal to pay ; and, distress.

The plaintiff pleaded in bar *de injuriâ*, upon which issue was joined.

Upon the trial of the cause before Mr. Justice Wightman, a verdict was found by consent for the plaintiff, subject to a special case to be stated for the opinion of the Court of Queen's Bench, with liberty for either party to turn that case into a special verdict. The Court of Queen's Bench, after taking time to consider, on the 3d day of February, 1847, gave judgment for the plaintiff.<sup>1</sup>

The special case was then turned into a special verdict, by which the jury found that the parish of Saint Pancras, from the year 1819 to the year 1832, was governed by the Local Act 59 Geo. III. c 39 : that in the year 1832 the parish adopted the Act of 1 & 2 Wm. IV. c. 60, which was the law in the parish for the election of vestrymen from that time to the commencement of the suit : that the election took place annually, one third of the vestrymen going out by rotation annually, and vacancies from death or other causes being filled up at the same time : that the number of householders exceeded ten thousand : that on the 6th day of May, 1839, an election, in fact, of forty-six persons, took place to supply the places of forty who were to go out by rotation, and six occasional vacancies :

<sup>1</sup> 13 Q. B. 687.



that the said forty-six persons were not duly elected, nor was there any due election of vestrymen in 1839, but the said forty-six persons continued to act as vestrymen during 1839, and were all qualified to act as vestrymen if they had been duly elected : that nineteen of them formed a portion of the forty who were to go out by rotation in that year : that on the 12th of August, 1839, a meet-

ing of the persons acting as vestrymen of the parish was  
 \* 423 duly convened \* and held, in the manner and for the purpose in the avowry mentioned ; and that copies of notice of the meeting and of the purpose thereof were affixed as mentioned in the avowry ; and that all those persons who were previously members of the vestry and were not to go out by rotation, as well as the forty-six persons elected in fact at the above-mentioned election in 1839, were summoned : that, of the forty who were to go out by rotation in the year 1839, those who were not re-elected were not summoned to that or any subsequent meeting : and that Richard Horspool was elected chairman. (The verdict then set out the entry of the proceedings at the meeting in the book kept for that purpose according to the 59 Geo. III. c. 39, as follows) :—

“ Vestry Minute Book, No. 13. — Parish of St. Pancras, in the county of Middlesex. At a general meeting of the vestrymen of the said parish, held at the Vestry Rooms, Gordon Street, on Monday, the 12th of August, 1839, pursuant to adjournment.

“ Richard Horspool, Esquire, in the chair, and thirty other vestrymen present, viz.” (Names stated.)

“ The minutes of the last vestry were read and confirmed. The vestry proceeded to the order of the day (pursuant to the minutes of the last vestry, and to letters of summons issued for the purpose by the vestry clerk) to make a general rate for the relief of the poor of this parish. The notice of the present meeting, and the purpose thereof, as published on the churches and chapels of this parish on Sunday last, pursuant to the Act for regulating vestry notices, was presented and read. The extract from the minutes of the directors of the poor presented with the estimate of the expenditure at the last vestry was referred to, and ordered to be entered on the minutes as follows” (here followed the extract and estimate, and then the reports from committees

\* 424 for assessments) : “ Resolved \* unanimously, that a general rate of one shilling in the pound be made and laid on the inhabitants and occupiers of houses, lands, tenements, and

hereditaments, tithes impropriate, and impropriation of tithes in the parish of Saint Pancras, in the county of Middlesex, for and towards the relief of the poor of the said parish, and other purposes chargeable thereon, according to law, and the said rate is hereby made and laid accordingly, and is to be collected forthwith." — "Resolved, that the vestrymen be summoned for Wednesday, the 4th of September next, to elect and appoint a director of the poor in the place of Mr. W. Michaux. Adjourned to the 4th September next."

The special verdict went on to state the following facts. Eight of the persons present (who were named, and were eight of those mentioned in the avowry) were among those re-elected who were to go out by rotation at the election of 1839, and nine (also named) were among those then elected for the first time, and fourteen (also named, who, together with the eight above mentioned, were the twenty-two mentioned in the avowry) were persons who had been elected at the two preceding elections, and were then re-elected. A special general meeting of the persons acting as vestrymen was held on the 28th of August, 1839, such meeting being the next subsequent meeting to that of the 12th of August. Richard Horspool was elected chairman, when the minutes of the last meeting were read and confirmed, and the meeting was then occupied with considering a recommendation and plan for making additions and improvements to the workhouse of the parish. On the 4th of September, 1839, a general meeting of the persons acting as vestrymen was held, pursuant to adjournment from the meeting of the 12th of August, at which James Bradley was chairman, and at which the minutes of the last vestry were read and confirmed, after \* which the vestry heard applica- \*425 tions from poor parishioners for relief from payment of the poor rate. This meeting was adjourned to the 9th of September, when the minutes of the last meeting were read and confirmed, further applications for relief were considered, and the meeting was adjourned to the 14th of September.

After the resolution passed at the meeting of the 12th of August, the vestry clerk proceeded with all reasonable despatch to make up four books, which, when completed, contained, in addition to every other particular which the form of making out the rate mentioned in the said resolution required to be set forth, the names of the several occupiers of the rateable property within the said par-

ish; also the names of the owners of such property, and the description of the property rated, and the name and situation of such property; and also the gross estimated rental and rateable value thereof, and the amount of an assessment of one shilling in the pound upon such rateable value, besides every other particular set forth at the head of the respective columns in the form given in the schedule annexed to the "Parochial Assessments Act," so far as the same could be ascertained. The special verdict then alleged that the four books were not completed by the 9th September. In making them up, the resolutions and acts of the meetings of the 4th and 9th September were acted upon, as to those owners of property in the parish with whom compositions were entered into at those meetings. No one of the four books contained the particulars of all the rateable property in the parish, but the four books taken together did contain them. Each book contained the following entry at the commencement thereof: "Saint Pancras, Middlesex, — An Assessment for the relief of the poor of

the parish of Saint Pancras, in the county of Middlesex,  
 • 426 and for other purposes \*chargeable thereon according to law, made this 12th day of August, 1839, after the rate of one shilling in the pound, by the vestrymen of the parish of Saint Pancras, in the county of Middlesex, acting under and by virtue of the provisions of a statute made in the 59th year of the reign of King George III., intituled 'An Act for establishing a Select Vestry in the Parish of Saint Pancras, in the county of Middlesex, and for other purposes relating thereto'; which rate and assessment was made and assessed at a meeting of the said vestrymen, when seven or more, and not less than nine, of them were present, &c., being within the said parish, of which meeting notice was given according to law, and which said rate of one shilling in the pound is to be collected forthwith."

On the 14th September, 1839, a general meeting of the persons acting as vestrymen was held, at which William Pickman, one of the churchwardens, was chairman, of which the following was the entry: —

"The minutes of the last meeting were read and confirmed. — The vestry clerk presented the books containing the rate made on the 12th ultimo. The vestry proceeded to the order of the day, pursuant to letters of summons issued for the purpose, to settle and sign the new rate-books. — Resolved, that the said books be

now signed. The said rate-books were thereupon signed by ten vestrymen. — Resolved, that the vestry clerk make application for the allowance and confirmation of the said rate by two justices of the county of Middlesex, and thereupon cause due notice of such allowance to be given pursuant to the Act for regulating vestry notices. — Adjourned.”

The special verdict then stated that fifteen persons (named in the minutes) were present at that meeting, that five of them were persons elected in 1839, having been then in rotation to go out; that four were persons \* then elected for the first \* 427 time, and six were persons who had been chosen in the two preceding years. A declaration was written in each of the four books, at the end of the particulars contained therein, of which the following is a copy: “We [here follow the names of ten persons] do declare the several particulars specified in the respective columns of the above rate to be true and correct, so far as we have been able to ascertain them; to which end we have used our best endeavours”; and immediately under the said declaration the said ten persons signed their names, which was the only declaration or signature in any of the four books, except that of the justices.

The special verdict then stated the confirmation and allowance of two justices entered in each of the books, and due notice thereof; that, subject to the question whether the aforesaid signing was a sufficient signature of the rate-books,<sup>1</sup> and whether the facts disclosed constitute a sufficient making of a rate, the minutes and entries contain a correct account of what took place at the several meetings; that, except so far as the facts stated constitute a rate, no rate was made; and that there was no notice on or near to the doors of the churches or chapels in the parish, that the purpose of any of the meetings, except that of the 12th of August, was to make a rate.

The verdict then stated, nearly in the terms of the avowry, that the defendant Lorant was a collector of rates in the parish; that the plaintiff was liable to be rated in respect of the houses Nos. 2 and 4 Gordon Street, and that the sum of 11*l.* was demanded and

<sup>1</sup> Section 69 of the 59 Geo. III. c. 39, says: “And all such rates or assessments so to be made, when signed by the said vestrymen, or any seven or more of them, and allowed and confirmed,” &c. and notice of the allowance given, “shall and may be collected,” &c.

refused, as in the avowry mentioned, and the seizure and  
 \* 428 detention complained of \* made for the purpose and in the  
 manner in the avowry mentioned.

The question raised by the special verdict was, whether, upon the whole matter aforesaid, the defendant, of his own wrong and without the cause by him in his said avowry alleged, took and detained the goods and chattels of the plaintiff, as in the declaration complained of, or whether he did so with the cause by him in his avowry alleged.

The Court of Exchequer Chamber, after argument on the special verdict, on the 29th May, 1849, reversed the judgment of the Queen's Bench.<sup>1</sup> The present writ of error was then brought against the judgment of the Court of Exchequer Chamber.

*Mr. Peacock and Mr. G. Denman.*—The main question is, whether any valid rate was made by the vestry. The Court of Queen's Bench properly answered that question in the negative. The resolution passed on the 12th of August was merely an order that the rate should be made. No such rate was made then. Those who contend that what was then done amounted to making a rate must show that it was at that time a perfect proceeding. That cannot be shown. Even the Court of Exchequer Chamber agreed that the resolution of the 12th of August was not a complete rate. No one was at that time assessed in such a manner that, if dissatisfied, he might appeal; yet without such an assessment there cannot be a rate; for nothing else can enable a man to know whether he is assessed higher than his neighbours. If there was no rate made on the 12th of August, there certainly was none made on any other day, for there was not any proper adjournment of the several meetings, nor any proper notice of the business to be transacted at any of the adjourned meetings. In that respect, what was done  
 \* 429 was void, as not \* being done in accordance with the provisions of the 4th section of the 59 Geo. III. c. 39. The meeting of the 12th of August was summoned for the purpose of making a rate. Could that meeting adjourn without having effected that purpose? If it could, then could the adjourned meeting be held without a notice on the church door being previously given, stating the purpose for which such adjourned meeting was to be held? Both these, but especially the latter of these, questions must

<sup>1</sup> 13 Q. B. 706.

be answered in the negative. If so, then all that was done on the 14th of September is invalid. Supposing that the first meeting could lawfully be adjourned, then the vestrymen must be summoned, with notice of the purpose of the second. Nothing of this sort was done, and therefore the rate was not properly made. The meeting to make a rate is a meeting for a special purpose, and, according to the decision in *The Queen v. Belton*,<sup>1</sup> no special authority to be exercised by a meeting of persons under the provisions of a special statute, and not at common law, can be exercised by them upon adjournment. If the adjourned meeting was that at which the rate was to be made, then up to the last moment a rateable inhabitant might object to it because its amount was unnecessarily large, or for any other reason; but he would be prevented from doing this if such adjourned meeting was to be bound by the previous resolution, and the books there produced were to be taken as conclusive on the question of the amount of his rateability. There was no difficulty in making the rate at one meeting; or if there was, it was the result of the negligence of the vestry in not having the proper materials ready, and that negligence cannot confer new powers on those who were guilty of it. It is clear that the vestrymen cannot adjourn one meeting, leaving a special business unfinished; resolve that a summons \*shall be issued \*430 for another meeting, for another special business; and, then, at a third or fourth meeting, resume the business which had been left unfinished at the first. Yet that was done in this case; for on the 12th of September the vestry resolved that "a rate be made . . . and be collected forthwith"; and then resolved that the vestrymen be summoned for the 4th of September, to elect a director of the poor in the room of Mr. W. Michaux, and then adjourned to the 4th of September for the purpose of that election. It is impossible that any one could consider this as an adjournment for the purpose of making a rate, and consequently, if another meeting was to be held for that purpose, it was necessary that there should be a notice specially summoning the vestrymen to make a rate. There had been no notice of that kind here, and consequently the meeting was incapable of lawfully making the rate.

These adjournments were, besides, illegal in themselves. The law intended that the business proposed for a certain day should

<sup>1</sup> 11 Q. B. 379.

be terminated on that day ; a different practice might inflict injustice on many persons. A rate might be proposed, and ordered to be made, but the making of it might be delayed till a certain day of adjournment, and in the mean time many of the inhabitants of the parish would have changed.

Then comes the question, whether the avowry, as now framed, is sufficient in itself, and is sufficiently proved. The avowry states that the rate was made on the 12th of August, and the names of the vestrymen making it are given under a *videlicet*. It was, so far as that allegation goes, made at a meeting, of which notice had been given on the church doors. But the avowry goes on to say that, at "a certain other meeting," held on the 4th of September, "the rate so agreed upon, and made at the first-mentioned meeting," was signed. Yet the argument on the other side is, that

the 12th of August and the 14th of September are identical, \* although these and other statements in the avowry expressly distinguish between the two days. The doctrine of the Court of Exchequer Chamber, that all these meetings constituted but one, cannot be supported, for no fiction of law can be introduced here for such a purpose. The fiction here, too, is contradicted by the fact, that several of the intervening days of adjournment were occupied with business that had no reference to the rate.

[LORD BROUGHAM. — The same debate is carried on, though the day for taking it has been adjourned ; and the resolution passed at the last is in every respect the same as if it had been passed on the first day.]

That may be so with reference to debates in the Houses of Parliament, or with reference to the decisions of one of the superior Courts, pronounced in the same term ; but in both these cases that is an established fiction of law. It is not so with reference to vestry meetings. There is no authority for saying that an adjourned meeting is part of an original meeting.

[LORD BROUGHAM. — Is it not so almost *ex vi termini*? THE LORD CHANCELLOR. — Does not the same authority continue from day to day if the business is declared not to be concluded, as from hour to hour in the same day ? Suppose we were to adjourn now for a quarter of an hour, would it not be the same meeting when the House resumed its sittings?]

But in the avowry, the days are stated to be two distinct days,

for the rate is said to be made at the first meeting, and signed at a "certain other meeting." The adjournment was not made for the particular purpose then in hand, nor was there any notice at the same time given that the others were meetings by adjournment from the 12th of August. In Dickinson's Sessions Law it is shown that an indictment ought to be alleged not to have been preferred at a sessions held by adjournment, but at a sessions held on a particular \*day, and continued by adjournment to an- \*482 other day ; and the authority for this is the case of *The Parishes of Lingfield and Battle*.<sup>1</sup> In like manner, in *The King v. Heptonstall*,<sup>2</sup> it appeared that in the caption of an order, the sessions were said to be holden on such a day by adjournment ; but as it did not appear when the original sessions were holden, the order was quashed. The same rule was adopted in *The King v. Harrowby*.<sup>3</sup> There are many Acts of Parliament in which churchwardens and vestries are authorised to hold meetings ; but there is none which declares that the power of an adjourned meeting shall always relate back to another, so as to make what is done at the adjourned as valid as if done at the original meeting.

The form of proceeding adopted in this case was ineffectual : it cannot be contended that the signing which occurred on the 14th of September was a signing of the rate. The four books prepared between the 12th of August and the 14th of September contained a declaration which was signed, but that was not a signing of the rate, unless the declaration is taken to be the rate. But if it is, then arises the other difficulty, that the rate was made on the 14th of September, and not on the 12th of August, and, if so, there is no resolution of the 14th September warranting the rate. In truth, the signatures merely attested that the statements made in the different columns of the four books were correct, not that the persons signing them declared a rate of a shilling in the pound to be necessary or proper. The Local Act requires the rate itself to be signed, and this signature of the books is not a compliance with the Act. Here, too, there was a contradiction on the face of the document itself, for the heading of the book is, "Assessment for the Relief of the Poor made on the 12th of August, 1849," whereas the signature which is supposed \*to be the making \*483 of this assessment is dated 14th September, 1849. The

<sup>1</sup> 2 Salk. 605.<sup>2</sup> Burrow Set. Cas. 102.<sup>3</sup> Burrow Set. Cas. 88.



persons signing did not declare that they were then signing what was done on the 12th of August, and in truth they could not so declare, for it is not pretended that they were present on that day. Assuming that the rate had been made on the 12th of August, they signed a declaration that the books then made up, namely, on the 14th of September, were correct. Now the case of *The Queen v. Fordham*<sup>1</sup> shows that if the rate is not properly signed, it is of no force or validity.

In another respect this rate was not properly signed. Of those who were present on the 14th of September, only six who were properly and lawfully vestrymen signed the rate. No rate can be valid under the Local Act, if signed by less than seven vestrymen; and the signature of one man, who merely acts as a vestryman but is not lawfully in office, is not sufficient to make up the required number, so as to afford a compliance with the Act. Vestrymen *de facto* have no authority to make a rate. No doubt corporations *de facto* may do an act which is to keep up the corporation. That is a matter of necessity; but here no such necessity existed, for there were eighty vestrymen against whose title no objection existed. The necessity to do an act is often, in cases of corporations, the test of the title to do the act. *Kyd on Corporations*.<sup>2</sup> This case differs from that of *Penney v. Slade*,<sup>3</sup> where the appointment of overseers was held not to be a judicial but a ministerial act, and where therefore an irregularity in their appointment left unquestioned before the tribunal which had authority to adjudicate on it, was held not to affect the validity of a rate made by these irregularly appointed overseers. And it also differs from \* 434 that of \* *Turner v. Baynes*,<sup>4</sup> where it was held that churchwardens *de facto*, whose election was doubtful, might maintain an action against a former churchwarden for money had and received by him to the use of the parish, because there the necessity of the case allowed such a proceeding, while here no such necessity exists.

*Mr. Prendergast* and *Mr. Needham* (*Mr. Bagley* was with them) for the defendant in error. — The objection to the rate on account of a supposed defect in the title of the vestrymen cannot be sustained. Persons in possession of an office are competent to per-

<sup>1</sup> 11 Adolphus & Ellis, 73.

<sup>2</sup> 7 Scott, 285, 5 Bingham N. C. 319.

<sup>3</sup> Page 453.

<sup>4</sup> 2 H. Blackstone, 559.

form the duties of that office, so far as third parties are concerned. Here the vestrymen who made the rate were *de facto* in office, and the Court will not, in an action for levying the rate, inquire into the lawfulness of their election.

[THE LORD CHANCELLOR. — You need not trouble yourself with the question whether the vestrymen *de facto* had power to make this rate. The main points are these. First, when was the rate made in point of law and in fact? Secondly, whatever period you fix as that at which the rate was made, was there sufficient notice given of the time and purpose of the meeting? Thirdly, does the avowry sufficiently allege a lawful making of the rate, and is the avowry proved?]

Argument continued. — There is no dispute that proper notice was given that there was to be a meeting on the 12th of August, for the purpose of making a rate. That meeting took place, and the object was effected as far as it was possible to effect it. A resolution was passed that a rate of a certain amount was then and there made. That meeting was adjourned to the 4th of September. The computation \* according to which the \* 435 rate was to be levied was strictly part of the business of the day on the 4th of September and again on the 14th of September. On the latter day the computation was completed, and the books being then perfectly prepared, the vestrymen terminated the business which had been begun on the 12th of August, and signed the declaration which the law requires.

[THE LORD CHANCELLOR. — Was the rate in contemplation of law made on the 12th of August or the 14th of September?]

It cannot be said to have been finally made till it had been allowed by the justices. Yet in many respects it was made when the resolution was passed, for it then became binding on the parishioners, and the meeting of the 12th of August was in fact regularly carried on by adjournment from the 12th of August to the 14th of September. From the moment the resolution was passed, all the inhabitants of the parish were aware of the rate, and its amount, and considered it as imposed; but the necessities of business, for which the law must, and does, make allowance, compelled the vestrymen to perform some part of the form of completing the rate on a subsequent day. There can be no doubt that the vestry could have adjourned from one hour to another on the same day; and an adjournment from one day to another is equally

justified. The rule which applies to the session of Parliament, *Latless v. Holmes*,<sup>1</sup> and *The King v. Thurston*,<sup>2</sup> or to Quarter Sessions, *The King v. The Justices of Wilts*,<sup>3</sup> and to the Term,<sup>4</sup> applies in the same manner to the business of a vestry. *Stoughton*

\*436 *v. Reynolds*,<sup>5</sup> and *The Queen v. D'Oyly*.<sup>6</sup> \*The inconvenience of refusing to adopt that as the rule of law would be very serious.

[*Mr. Peacock*. — There is no objection to the power of the vestry to adjourn, but it is contended that notice of the purpose of the adjourned meeting must be given.]

There is no rule that a fresh notice of the purpose of a meeting must be given when it is an adjourned meeting, and when due notice of the purpose has been given on convening the original meeting. In *The King v. Harris*,<sup>7</sup> at a meeting of the corporation of Cambridge, held on the 31st of May, 1830, by adjournment from the 27th of April, one of the Grand Common Days of this corporation, it was resolved to remove the town clerk from his office, and the Court of King's Bench held that no previous notice to the members of the corporation of the purposes of the adjourned meeting was necessary, inasmuch as it was held by adjournment from one of the days on which by charter the corporation is appointed to meet, and when every member of the corporation is supposed to be present. That case is much stronger than the present, for there no notice of the purpose of the meeting to be held on the Charter day had been given; but here the notice of the purpose of the meeting of the 12th August was expressly given. The principle applicable to all such cases is clearly stated by Mr. Justice Coleridge in the case of *The Queen v. Grimshaw*,<sup>8</sup> "that a quarterly meeting may indeed be adjourned to complete unfinished business, and in such cases no summons may be necessary; but that no fresh business which may casually arise can be transacted at this adjourned meeting, unless notice and summons have been issued." In *Butt v. Fellowes*,<sup>9</sup> the notice of the purpose

of the original meeting was given by a churchwarden, who, \*437 not \*being duly elected, had no right as such to give

<sup>1</sup> 4 Term Rep. 660.

<sup>2</sup> 1 Levinz, 91.

<sup>3</sup> 13 East, 332.

<sup>4</sup> Com. Dig. Temps. c. 7.

<sup>5</sup> 2 Strange, 1045.

<sup>6</sup> 12 Adolphus & Ellis, 139.

<sup>7</sup> 1 Barnewall & Adolphus, 936.

<sup>8</sup> 10 Q. B. 755.

<sup>9</sup> 3 Curteis, 680, 687.

the notice ; but as the notice could be given by a private parishioner, and he being such, the Court held it to be sufficient, and, having been given, the rate which was made at an adjourned meeting was held good. The decision there is very strongly in favour of the defendant in error, because the regularity of the proceedings was a question expressly raised on the face of the record.

It is a mistake to suppose that the vestry was adjourned from the 12th of August to the 4th of September, for the purpose of electing a director in the place of Mr. W. Michaux. The adjournment was a general adjournment to the 4th of September, and then a special order was made that notice should be given of the election of a director on that day. That was not the business for which the meeting was adjourned ; but it having been determined to adjourn, notice of this special business was given, that it might be lawfully introduced at such adjourned meeting, which thereby became for that particular purpose a special meeting. This was in accordance with the principle stated by Mr. Justice Coleridge in *The Queen v. Grimshaw*.<sup>1</sup> The effect of an adjournment is to continue all things in the same state in which they were when the adjournment took place.

The form of the rate here was perfectly good, and according to *The Queen v. Fordham*,<sup>2</sup> a rate, though not exactly following the form prescribed by that Act, is good, for the words of "no force and validity" in the 2d section of the 6 & 7 Wm. IV. c. 96, only apply to the case of the declaration at the foot of the columns not being signed by the parish officers. Here they were duly signed, and therefore the objection does not arise. Nor is there any good objection to the rate, on the ground that if adjournments \* are allowed after the voting of a particular rate and \*438 the formal completion of it, the persons who are to pay it will not be the same ; for the liability is established by the resolution to impose the rate. That was held with relation to the calls made by a railway company in *Ex parte Tooke*,<sup>3</sup> and the principles there stated are equally applicable to cases of rates.

The avowry is good, and is supported by the facts found by the special verdict, for it shows that a rate was made after the passing of the Act, while the plaintiff was liable to be rated, and before seizure of his goods. As to the form of the avowry, it is justified

<sup>1</sup> 10 Q. B. 755.

<sup>2</sup> 18 Law Journal N. S. Q. B. 348.

<sup>3</sup> 11 Adolphus & Ellis, 73.

by the case of *The Attorney-General v. Clerc*.<sup>1</sup> There an information was filed at the suit of the Crown, and it was alleged that, after the passing of a Customs' Act, and before an information filed, to wit, on the 30th of August, 1842, the officers seized as forfeited certain French wines, for that before the filing of the information, and before the said 30th of August, to wit, on the 20th of August, one T. S. entered the wines for exportation to obtain a drawback, and before the said 30th of August, 1842, the officers examined the wines, and found that they were of less value than the drawback. It was proved that the examination and seizure took place on the same day, and on a motion to arrest the judgment on the ground of the variance, the Court held that the words "before the 30th of August" might be omitted as surplusage. In the same manner the words in this avowry, which appear to render it doubtful when the rate was made, if any such there are, may be rejected, and the avowry must be taken to allege in substance that a rate was lawfully made before the seizure of the plaintiff's goods.

The avowry is supported by the facts. It is said on the \*439 \* other side, that to treat the several meetings as one is to rely on a fiction of law. But it is no fiction of law that a meeting regularly called for a specified purpose was as a matter of necessity extended over several days. There is no doubt that the first meeting was properly summoned, and being so, it might lawfully be adjourned, and what was done at it might be described as done at the first meeting, of which, in law, it formed part.

The avowry, therefore, is sufficient, and is proved.

*Mr. Peacock*, in reply. — When the first meeting was adjourned, there was nothing to show in respect of what property the rate was made. The rate, therefore, then resolved on was invalid. *The King v. The Aire and Calder Navigation*.<sup>2</sup>

The case of *Ex parte Tooke*<sup>3</sup> is not applicable, for the directors of a company make a complete call when they resolve that a call of so much per share shall be made; but in making a rate of so much in the pound on the rateable value of property in a parish, the vestry has to discover and declare what is the rateable value of

<sup>1</sup> 12 Meeson & Welsby, 640.

<sup>2</sup> 18 Law Journal N. S. Q. B. 343.

<sup>3</sup> 2 Barnewall & Cresswell, 713.

the property possessed by each individual, before the rate on him is complete.

**THE LORD CHANCELLOR.** — My Lords, — This case arises in an action of replevin, in which the plaintiff complains that his goods were seized by the defendant.

The defendant justifies the act by an avowry which alleges that the goods were seized for a poor rate, which rate was made under the authority of a statute, and a distress warrant was issued in order to levy that rate.

Several objections have been taken on the part of the plaintiff against the judgment given by the Judges in the \* Court below in favour of the defendant. Those objec- \* 440 tions have ultimately resolved themselves into three. It is first objected that the rate which is set forth in the avowry was not made by competent authority.

It appears that by the Statute of the 59 Geo. III. c. 39, authority is given to the vestry of the parish of Saint Pancras to meet, and by a majority of the persons present, consisting of not less than seven, to make a poor rate; and it is stated that the poor rate in question was not made under the authority given by the statute, by reason that some of the persons who joined in making the rate had not been legally elected to the office of vestrymen. It is undoubted, however, that they acted in point of fact as vestrymen, and that when they were assembled in the vestry, they were acting in that character; and it is for so doing that the rate itself is now sought to be impeached.

It is therefore objected that, by reason of those persons thus acting as vestrymen not having been duly elected, their acts were void, and that the poor rate made by and with their concurrence ought not to be considered legal.

It is further objected that, in the avowry in this case, the party has alleged that, after the passing of a certain Act of Parliament (to which I have already alluded), and before the taking of the goods, and whilst the property of the plaintiff in respect thereof was liable to be rated, to wit, on the 12th of August, a certain rate, that is the rate in question, was made. And then it proceeds to state that the rate which was so made contained all the particulars required by the Statute 6 & 7 Wm. IV. c. 96. And upon the facts which are set forth in the special verdict, it is objected, on the

part of the plaintiff, that the allegation to which I have just referred is not proved. And the objection arises out of the following facts.

It appeared that on the 12th of August a meeting of the  
 \* 441 \* vestry of the parish had taken place, and that at that vestry meeting it was resolved that a rate of one shilling in the pound should be made, and it was thereby made; but that, in consequence of the parish of Saint Pancras consisting of many thousand inhabitants, the rate-books could not be made up at once, that is to say, the rate of one shilling in the pound could not be at that meeting apportioned and applied to the several inhabitants of the parish liable to be rated, partly on account of their numbers, and partly because of the necessity of ascertaining the amount of property liable to be rated, and also of ascertaining what number or proportion of the inhabitants liable to be rated would be incompetent to pay the rate; all which things it was necessary to ascertain, in order to fix the amount to be assessed upon the inhabitant rate-payers; so that the sum required for the purpose of the relief of the poor might be raised.

Under these circumstances it was impossible completely to discharge the duty of the meeting, and the meeting adjourned to a certain day. On that day it again assembled, and subsequent adjournments, three or four in number, took place up to the 14th of September. It appears by the verdict, that on the 14th of September the vestrymen whose ministerial duty it was to prepare the rate-books for the vestry had the books fully prepared. They were then presented to and adopted by the vestry, and signed.

Under that state of facts put forward as constituting his liability to be rated, the defendant says the rate cannot be sustained, and consequently the question that arises upon that is, whether those facts being proved, his property is to be considered as having been duly rated.

It is further objected that, by the 69th section of the Act which gives the authority to make the rate to the vestry, or to a  
 \* 442 majority of not less than seven, it must be done \* at a meeting of which notice must have been given on the previous Sunday, and that the notice must state the purpose of the meeting. It is clear that, with regard to the meeting on the 12th of August, notice had been given in conformity with the statute. By the fourth section of the Act in question, it is provided that

of any adjourned meeting which may be necessary for the vestry, notice must be given three days before the time appointed for holding such meeting, and also notice to each of the vestrymen; but the Act does not give any direction whatever that the notice shall contain more than an intimation of the fact of the adjourned meeting being about to be held. It does not require that the purpose of that meeting shall be stated in the notice. The 69th section having, in express terms, provided that notice shall be given of the purpose for which the meeting is to be held, the fourth section only provides that notices of the meeting shall be given, and it contains no requisition in regard to a statement of the purpose for which it is to be held.

But it is objected on the part of the plaintiff in error, that inasmuch as the entire business of making the rate was not completed on the 12th of August, each subsequent meeting, at which any thing was to be done in relation to making the rate, ought to be deemed a distinct and substantive meeting, unconnected for this purpose with the previous meeting, and requiring as much notice of the purpose of the adjourned meeting as the original meeting required.

That is answered on the other side by saying, that the statute is the guide which is to regulate and govern these matters, and that you are bound to give such notice as the statute requires, and no other. And that has been done in this case, by giving the notice, stating the purpose of the meeting, on the Sunday preceding the 12th of August, and \*giving notice of the \*443 fact of the adjourned meetings in respect of each of the others.

These are the objections and answers for your Lordships' consideration: First, that the vestrymen who made the rate had not been duly constituted for this purpose, some of the vestrymen not being duly elected, though acting *de facto* as vestrymen. Secondly, that with respect to the meetings at which the rate was partially made, namely, those at which the books from time to time were gone into, before being ultimately approved on the 14th of September (there being several of such meetings), and the notices of them not containing the purport of the business for which they were to be held, all that was done at those meetings is rendered perfectly invalid for the purpose of making the rates.

The further question raised by the plaintiff in error is, whether



or not the mode in which the rate is alleged to have been made upon the avowry is supported by the facts which are stated in the special verdict to have been the facts that took place.

Your Lordships have heard arguments in relation to these points, and I therefore beg to state that the first question for you to determine is, if authority be given by a statute for a majority of the vestrymen, or for seven or more, to make a rate, would the rate, unobjectionable in other respects, be valid if made by seven vestrymen *de facto*, one of such vestrymen not being a vestryman *de jure*.

The second question I should propose to your Lordships is this: by the Statute of the 59 Geo. III. c. 39, authority is given to the vestry to make a rate, notice of the meeting and the purpose thereof being first given on the Sunday immediately preceding

such meeting; and by the same statute it is enacted that, \* 444 of each adjourned meeting \* to be held, a notice in writing shall be given to each vestryman three days previous to such intended meeting. At a general meeting of the vestrymen of the parish, held on the 12th of August, it was resolved that the rate be made; but the assessment was not then made, and the vestrymen adjourned generally to several successive days, the last being the 14th of September, when the assessment was completed and made. Notice was duly given of the meeting held on the 12th of August, and of the purpose of that meeting. Notices were also given of the adjourned meetings to each of the inhabitants.

The question I should propose would be this: If the last-mentioned notices did not state any purpose in connection with the adjourned meetings, supposing the rate before mentioned to be otherwise valid, was the assessment invalid by reason of the notice of such adjourned meetings not stating the purpose of such respective adjourned meetings?

The third question I should propose is this: In an action of replevin, the avowry alleging that a poor rate had been made, after the passing of a certain specified Act, and before the taking of the plaintiff's goods, and whilst the property of the plaintiff in respect thereof was liable to be rated,—to wit, on the 12th of August,—would the allegation be well proved by proof of the following facts: that a vestry was held on the 12th of August, at which it was resolved unanimously that a general rate of one shilling in the pound should be made and laid on the inhabitants and occupiers

of houses, lands, tenements, and hereditaments in the parish, for and towards the relief of the poor of the said parish, and other purposes chargeable thereon, according to law: and “the said rate is hereby made and laid accordingly, and is to be collected forthwith”; that the assessment could not then be completed, in consequence of the number of the inhabitants of the parish liable to be \* rated, and the necessity of ascertaining the \* 445 assessment necessary to be made, in order actually to ascertain the amount required for the poor; that the vestry adjourned generally to several successive days up to the 14th of September, and upon that day the assessment was completed; that upon each of the adjournment-days the vestrymen proceeded upon business connected with the assessment, namely, to hear applications from persons to be relieved from payment of the poor rate, and from persons making composition with respect to the same; but although the vestry clerk proceeded with all reasonable despatch to make up the books necessary to complete the rate, such books were not completed until the 14th of September, when the vestry clerk presented the books containing the rate mentioned in the resolution adopted on the 12th of August, and the assessments upon the inhabitants, calculated according to the resolution at the sum of one shilling in the pound; that the vestrymen thereupon proceeded to settle and sign the rate-books, and it was resolved that the vestry clerk should then make application for the allowance and confirmation of the rate before two justices, and should cause due notice to be given thereof.

My Lords, it appears to me that these three questions embrace all the points which have been made at the bar in order to impeach the judgment of the Court below; and, in conclusion, as your Lordships have the assistance of the learned Judges in forming an opinion upon those points, I beg leave to move that the questions which I have now read be submitted to their consideration.

LORD BROUGHAM.—I entirely agree in what my noble and learned friend on the woolsack has stated.

The Judges retired to consult, and after some time returned.

\* LORD CHIEF BARON.—My Lords,—In answer to the \* 446 first question proposed by your Lordships, I have to report the unanimous opinion of the Judges in the affirmative. We think

that the vestrymen *de facto* were as competent to join in making a rate as the vestrymen *de jure*.

In answer to the second question proposed by your Lordships, I have to report that we are unanimously of opinion that the rate was not rendered invalid by reason of the alleged defect in the notices of the adjourned meeting. We think it was sufficient to give notice on the church door of the purpose for which the first meeting was to assemble, and that that notice extended to all the adjourned meetings, such adjourned meetings being for the purpose of completing the unfinished business of the previous meetings, and all being in continuation of the first meeting.

In answer to the third question, I have to report to your Lordships the unanimous opinion of the Judges, that the substance of the allegation is, that the rate was made after the passing of the Act, and before the taking of the goods, and whilst the property of the plaintiff in error was liable to be rated for the rate; and we are unanimously of opinion that the facts stated in the special verdict will support the allegation.

THE LORD CHANCELLOR. — Your Lordships have heard the opinion which the learned Judges have just delivered as the opinion entertained by them, and in that opinion I entirely concur.

The objections are all in the nature of technical objections. But it is satisfactory to know that, if the rate had been impeachable upon any ground of what may be called merits, as contradistinguished from technicality, the party might have obtained \*447 redress; but, at the same time, your \* Lordships will not feel at all inclined to overlook the statute, but you will rather feel inclined to secure the observance of the statute, which is so framed for the purpose of giving the vestrymen the power of making the rate. Upon the present occasion, therefore, whether the objections are technical or substantial, your Lordships will look to the statute, and give your judgment according to the construction of the statute; and it is satisfactory to know that, if there were any objections substantially impeaching the rate, the plaintiff in error has had an opportunity of taking them, and that it was also open to him to take any technical objection he might be advised.

But, my Lords, as it now appears, by the opinions of the learned Judges, given unanimously, that the adjourned meetings were to be considered as a continuation of the first meeting, and that the

first meeting was duly convened ; that answers the objection, which appears to have more of substance in it than any other.

With regard to the competency of the vestrymen, who were vestrymen *de facto*, but not vestrymen *de jure*, to make the rate, your Lordships will see at once the importance of that objection, when you consider how many public officers and persons there are who are charged with very important duties, and whose title to the office on the part of the public cannot be ascertained at the time.<sup>1</sup> You will at once see to what it would lead if the validity of their acts, when in such office, depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most destructive kind. It would create uncertainty with respect to the obedience to public officers, and it might also lead to persons, instead of resorting to the ordinary legal remedies to set right any thing done by the officers taking the law into their own hands.

I think, therefore, that the principle laid down by the \* learned Judges, as the principle of law, is one that is in \*448 conformity with public convenience, with reference to the discharge of the duties connected with the office.

I feel, therefore, perfectly satisfied myself with regard to the opinion which the learned Judges have delivered ; and, entirely concurring in that opinion, I submit that the judgment of the Court below ought to be affirmed.

LORD BROUGHAM.—I quite agree with what my noble and learned friend has just now said.

The last point is, no doubt, as he said, of great importance. We had it a few years ago in a case that came before us in exactly the same form in which it is now stated.

*Judgment for defendant in error, with costs.*

The following Order was afterwards entered on the Journals : "That the said judgment, given in the Court of Exchequer Chamber, reversing a judgment given in the Court of Queen's Bench for the said plaintiff in error, be, and the same is hereby affirmed, and that the record be remitted, to the end that such proceeding may be had thereupon as if no such writ of error had been brought into this House." — *Lords' Journals*, 1851, p. 359.

<sup>1</sup> See *Dimes v. Proprietors of the Grand Junction Canal*, post, p. 786.

1851. July 10, 11.

THE BARON DE BODE, *Plaintiff in error.*  
THE QUEEN, *Defendant in error.*

*Petition of Right. Statute.*

A., a British subject, claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first French Revolution. The governments of England and France entered into conventions respecting compensation to be afforded to British subjects. The English government received all the money agreed upon between the two governments as the amount of compensation, and undertook to satisfy all the claimants. An Act of Parliament was passed declaring how claims were to be preferred and liquidated. A. presented his claim to commissioners appointed under the Act, and adopted the modes of proceeding provided by it; his claim was rejected. After payment of the claims which were established to the satisfaction of the commissioners, a surplus remained, which, in accordance with one of the provisions of the Act, was paid over to the Lords of the Treasury. A. proceeded to make his claim afresh under a petition of right:—*Held*, that he had no remedy except under the provisions of the statute.

In the year 1839, the Baron Clement Joseph Philip Pen 'de Bode, the father of the plaintiff in this writ of error, presented to the Queen a petition of right, claiming an indemnity for losses suffered by him at the time of the first French Revolution. The petition set forth a narrative of the following facts.

Before the treaty of Münster and peace of Westphalia, concluded between France and the German empire in 1648, the province of Lower Alsace belonged to Germany, but was by that treaty ceded to France, the legal proprietary rights of the German *immediate* nobility being expressly preserved. The barony of Fleckenstein, of which the lordship of Sulz formed part, was an ancient fief, descendible in the direct male line, and was  
\* 450 held, *immediately*, under \* the empire, the Archbishops of Cologne being its protectors, and having the right to appoint a new feudatory on the failure of issue male of any preceding line, such feudatory being a member of the immediate nobility of the empire. Baron Charles Frederick de Bode was one of the immediate nobility of the empire, and in 1776 he married Mary,

daughter of Thomas Kynnersley, Esq., of Loxley Park, in the county of Stafford, where Clement Joseph was born, 1777. On the failure of the German line of Rohan Soubise, in 1786, the then Baron Charles Frederick de Bode obtained from the Archbishop of Cologne the appointment to the fief, the investiture of which was given in due form by the officers of the archbishop to Baron Charles Frederick, as the first or immediate taker and feudatory for life ; and to Clement Joseph Philip Pen de Bode, his son, as the next in succession. In 1791, Baron Charles Frederick made a formal cession of his rights in the property to his son Clement Joseph, who was a British subject ; and (as the claimant alleged), from the time of the cession, the property was always administered in the son's name. In the early part of October, 1793, both father and son fled from Sulz, and took refuge with the Austrian army, then in the neighbourhood ; and on the 10th day of that month a decree of confiscation of property was pronounced by the French Republican authorities, constituting the government of the department, against several persons, among whom was expressly named "Bode, de Soultz." The property of Baron de Bode was, under this decree, taken possession of by the French government, when part of it was sold, but the remainder continued in the possession of that government until after the restoration of the Bourbons, in 1814.

Baron Charles Frederick, who with his son entered into the Russian service, died in Russia in 1797, and Baron Clement Joseph, his son, succeeded to the title. By the \* fourth \* 451 additional article of the treaty of peace, dated 30th of May, 1814, it was stipulated that certain commissioners of both England and France should undertake the examination of the claims of British subjects upon the French government for the value of property moveable and immoveable, "unduly confiscated" by the French authorities subsequent to 1792. By the fifth article of the Convention No. 7, concluded at Paris on the 20th of November, 1815, between Great Britain and France, certain regulations were settled, by which the amount due to British claimants in respect of immoveable property was to be ascertained. A period of three calendar months from the 20th of November, 1815, was to be allowed to claimants resident in Europe to present their claims. On the 28th of December, 1815, a commission was issued to certain individuals therein named to meet the French commissioners, and

\* 453 was subsequently passed, and \* the same gentlemen were reappointed commissioners under the Act. The claimant, \* 454 not being aware that his name \* was not on the register, presented his case before the commissioners, who, in the month of April, 1822, made an award, rejecting his claim. The claimant appealed to the Privy Council against this award, by which body it was confirmed, on the ground that the \* 455 alleged transfer in 1791 \* was only a fraud by Baron Charles Frederick on the French Revolutionary government. This award was at once confirmed by the King, and the surplus fund then in the commissioners' hands was paid over to the Lords of the Treasury. The claimant applied to the Privy Council for a rehearing, but was refused, on the ground that, after a confirmation by the King of the decision of the Privy Council, that body had no authority to rehear a case. Various applications were made by the claimant to the House of Commons for relief, and he also moved the Court of Queen's Bench for a mandamus to the Lords of the Treasury, to command them to pay over to him the surplus transferred to them by the Commissioners of Liquidation ; which motion was refused,<sup>1</sup> on two grounds: first, that the claim was an unliquidated demand, and next, that the

sums shall be insufficient for the payment of such claims in full ; and that such payment in full or in part, and any rejection of any such claims as shall by the said commissioners, or on appeal to his Majesty in Council, in manner hereinafter mentioned, be adjudged not to be within the true meaning and intent of the said conventions, or any of them, shall be respectively final and conclusive, and shall be held to be a full and entire discharge of the French government and of his Majesty's government from any demand in respect of any claims falling within the object and true intent, effect, and meaning of the said conventions, or any of them, and which have been inserted in the said registers during any period allotted for that purpose by the several conventions."

The sixteenth section enacted, "That during the time that any capital inscribed in the great book of the public debt of France, &c. shall remain in the names of the said Commissioners of Deposit, and shall not have been appropriated to the liquidation of any claims of his Majesty's subjects under the said conventions, or any of them, it shall be lawful for the Commissioners of Deposit," on receiving directions from a secretary of state, or from the Lords of the Treasury, to sell the same, and transfer the proceeds to England, to the Commissioners for Liquidation, &c. "for the purposes of being applied to the payment or liquidation of any such claims, or, in case all such claims shall be paid or liquidated, for such other purposes as the said Commissioners of the Treasury shall direct the Commissioners of Liquidation to apply the same."

<sup>1</sup> 6 Dowling P. C. 776.

commissioners held the fund as the servants of the Crown, against which no mandamus could issue. The claimant concluded his petition with a prayer that the Attorney-General might answer the same, and that such relief as was just might be granted.

Her Majesty having indorsed on the petition of right, "Let right be done," letters patent were issued under the great seal to certain persons, of whom John Farquhar Fraser, Edward Vaughan Williams, and Edward Smirke, Esquires, were three, to inquire by a jury into the matters of the petition, and an inquisition was held accordingly, when the facts on which the claim was founded, as alleged in the petition, were established by the finding of the jury. The inquisition was removed into the Court of Queen's Bench, when the Attorney-General pleaded three pleas: first, a traverse of the several matters and things in the petition and inquisition specified; secondly, that the supposed causes of petition did not accrue within six years of \*the presenting the said pe- \* 456 tition; and, thirdly, that the supposed causes of petition did not accrue since the accession of the present Queen. The claimant protesting against the sufficiency in law of each of these pleas, took issue on each. The case came on for trial at the bar of the Court of Queen's Bench in June, 1844, when the jury returned a verdict for the claimant on the first issue, as to the truth of the facts alleged in the petition, and for the Crown on the two issues as to the Statute of Limitations. Cross rules were obtained; by the claimant, to have the judgment entered for him on the second and third issues, notwithstanding the verdict found on them for the Crown: and by the Solicitor-General, to enter the judgment for the Crown on the first issue, notwithstanding the verdict found on that issue for the claimant. After argument, the claimant's rule was discharged, the other rule was made absolute, and the judgment was entered for the Crown on all the issues.<sup>1</sup>

The claimant died intestate on the 2d of October, 1846, and his son, having taken out letters of administration, brought a writ of error on that judgment. In November, 1847, the Attorney-General (Sir J. Jervis) moved to quash the writ of error; but that rule was discharged.<sup>2</sup> The case was then argued on the writ of error by Mr. Serjeant Manning for the suppliant, and the Court did not call on the Attorney-General to answer, but, after taking time to consider, gave judgment of affirmance, on the ground that

<sup>1</sup> 8 Q. B. 208 - 285.

<sup>2</sup> 13 Q. B. 364.



the suppliant had no right, except by claiming according to the statute, and that the statute had disposed of the whole fund.<sup>1</sup>

The present writ of error was brought on this judgment of the Court of Exchequer Chamber.

The Judges were summoned, and when the case came on \* 457 \* for hearing, Lord Chief Baron Pollock, Baron Alderson, Mr. Justice Patteson, Mr. Justice Erle, Baron Platt, Mr. Justice Williams, and Mr. Justice Talfourd attended. The counsel were directed, in the first instance, to confine themselves to the question, whether the Statute 59 Geo. III. c. 31, precluded the claimant from having any remedy except under its provisions.

*Mr. Serjeant Manning* and *Mr. Chisholm Anstey*, for the plaintiff in error. — The construction of the Statute 59 Geo. III. c. 31, to which the argument is now to be confined, must be ascertained from a consideration of all its provisions, and not from any one particular phrase. The statute contains the two conventions on which this claim is founded, and it must be admitted that in the first section are to be found words directing the commissioners to pay the money “among the several claimants whose names are duly entered in the said register”; but the introduction of those words did not restrict the awarding of compensation to those alone whose names were duly registered, — namely, registered within the prescribed time, — for if so, then, though actually registered, the claimants would be defeated, because they had not been registered in time; and this would affect those persons whose names, through the negligence of the commissioners themselves, had not been so registered. Nor can it be contended that those who proved themselves to have substantial claims on the fund were to be defeated merely because their names were not registered. If any surplus remained after paying the registered claimants, other claimants were entitled to it. Besides, with regard to this matter, the judgment of the Court of Exchequer Chamber proceeded on a mistake of the facts. It assumed that the claimant's name \* 458 had not been duly entered; whereas, so far as he was \* concerned, that was not the case; for he had sent in his name within the limited time, and the omission to register it was the fault of the commissioners, of which the Crown cannot now take advantage. With respect to the words, “if such sums received and still

<sup>1</sup> 13 Q. B. 381.

to be received from the French government shall be found to be sufficient," it is clear that they cannot affect the rights of the claimant, for they must be construed against the interest of those who inserted them, and they were inserted in the first convention by the French government, whose interest it was to reduce the claims and restrict them as much as was possible, and were afterwards introduced into the Act by the British government to limit, as far as possible, the liability it had undertaken. But the sixteenth section shows that this restriction on the claimants was not the real intention of the Act, but that, on the contrary, it intended that all persons who had claims, whether registered or not, should be entitled to come in and share in the distribution of the fund. The words of that section are general, and include all claims, whether registered or not. On the supposition that some money might remain after the full liquidation of the registered claims, the statute pointed out how that residue should be disposed of. The fund was to be put into the possession of the Crown. The Lords of the Treasury are the mere machinery to carry the will of the Crown into effect; and the transfer of the money to the Lords of the Treasury was, in fact, a transfer of it to the Crown, as a trustee for claimants who could show a real title to relief. The right to compensation, vested in the claimant under the conventions of 1814 and 1815, was vested independently of registration, which is a mere matter of convenience, and was not taken away by the effect of any thing done subsequently. The convention of 1818 was merely a transaction between the two governments, but did not affect the rights \* of parties previously guaran- \* 459 teed. A subject of this realm may become entitled to sue the Crown for compensation on a convention, and a proceeding by way of petition of right is therefore maintainable. This is a convention of indemnity. If the indemnity has been made by the act of the Crown less than it ought to be, then the subject has, on a petition of right, a claim on the Crown to supply the deficiency. The case of *The Merchants of England* claiming against *The Earl of Flanders*<sup>1</sup> is an authority for both these propositions.

There are several authorities showing that the principle on which this statute is to be construed will not operate to bar the present claim. The first is that of *Pawlett v. The Attorney-General*.<sup>2</sup>

<sup>1</sup> 1 Vol. Rotuli Parliamentorum, 18 Edw. I. p. 61, No. 195.

<sup>2</sup> Hardres, 465.

That was a bill to redeem a mortgage. There had been a mortgage by the plaintiff to one Ludlow, to whom, at the time of his death, a sum of money for interest was due. The mortgagor bound himself by statute and recognizance to perform the covenant, and to pay the debt. The mortgagee devised all his goods, &c. to his executor, and died. Edmund Ludlow, the son and heir of the mortgagee, was attainted of high treason. The King seized, and the executor extended the plaintiff's lands upon the recognizance. The plaintiff exhibited his bill against the King and the executor, and in it suggested that he could not pay the money at the place appointed by reason of the plague, and that afterwards the mortgagee accepted interest and waived the forfeiture; and the question on demurrer to the bill was, whether the plaintiff could have any remedy against the King to have a redemption; and it was said for the King that he could not, for this among other reasons:

that the King could not be compelled to execute conveyances.

\*460 And Lord Chief Baron \*Hale was of opinion that, "in natural justice, redemption of a mortgage lies against the King; but that as to the remedy, the King could not be ordered to reconvey, but that there might be an *amoveas manum*," as it would be contrary to natural equity that the Crown should retain the property against the mortgagor after the payment of the mortgage.

[THE LORD CHANCELLOR. — How do you apply that case?]

As an authority to show that the Crown cannot do acts which are against natural equity, without the law affording some remedy.

[THE LORD CHANCELLOR. — But is there any authority as to what may be enforced against the Crown, where the Crown has proceeded under the provisions of an Act of Parliament?]

The enactments of the Act proceed on false recitals; and in *The Earl of Leicester v. Heydon*,<sup>1</sup> it is shown that where such is the case, the subject is not concluded even by a statute; for it is there said: "For these recitals cannot be taken to proceed but upon information, and the Court of Parliament may be misinformed, as well as other Courts; and when they have recited a thing which is not true, it cannot be otherwise taken but that they were misinformed, for none can imagine that they would purposely recite a false thing to be true; for it is a Court of the greatest honour and justice, of which none can imagine a dishonourable thing." This doctrine must be applied

<sup>1</sup> Plowden, 398; and see 1 Inst. 110 a, and Friddle and Napper's Case, 11 Rep. 14 a.

to that recital in the Act now in question, which declares that "all the claims" had been duly registered, and then this claimant cannot be held to be barred because his claim had not been registered, and because it is untruly stated that all the claims had been registered.

[LORD BROUGHAM. — Suppose an Act recites that whereas Blackacre belongs to A., and then enacts something founded on that recital, when it really belongs to B., does the false recital annul the enactment? ]

\* It may be contended that it does. But, at all events, \* 461 that difficulty is answered by the fact that this is a petition of right, the purpose of which is to do justice, notwithstanding any technical objection of law the other way: *Lucy's Case*,<sup>1</sup> where it appears that if *quare impedit* be brought in the case of the King, he will, in case of default through the judgment on the writ, do right on petition. The commissioners had authority in themselves to pay over the money to the claimant, instead of which they acted on an order of the Lords of the Treasury, and paid it over to the Treasury. If they did this, as they say they did, under the Act, then they deprived the claimant of a statutory remedy, and left him only the remedy at common law by the petition of right. By the act of payment over of the alleged surplus, the commissioners determined that their commission was ended, and no application could afterwards be made to them. The claimant was thus thrown on his petition of right, which Lord Somers<sup>2</sup> shows to be, under such circumstances, the proper common law remedy of the subject against the Crown.

The petition of right here is so shaped as to attach equities on the residue of the fund in the hands of the Crown, as Lord Chancellor Eldon, in *Hill v. Reardon*,<sup>3</sup> said might be done. In that case it was held, with regard to these conventions, that the conventions, and the Act for carrying them into effect, did not exclude the jurisdiction of a Court of Equity to examine and enforce equities attaching upon the compensation in the hands of the persons in whose favour the award of the commissioners had been made. Lord Eldon there said: <sup>4</sup> "I can fancy a hundred cases in which the decision of the commissioners would not only not be

<sup>1</sup> Rot. Parl. 33 Edw. I. 1 Vol. p. 170, Nos. 97, 98.

<sup>2</sup> The Bankers' Case, 14 Howell State Trials, p. 83.

<sup>3</sup> 2 Russell, 608.

<sup>4</sup> 2 Russell, 629.

\* 462 \* a bar to the person claiming equitable rights, but would even operate in support and furtherance of them. If there existed here the relation of trustee and *cestui que trust*, I should have no doubt of the jurisdiction." There was an equity here, for the money was paid to the English government, in trust for the parties entitled. In such a case there can be no doubt that there ought to be a trust declared as against the Crown: *Penn v. Lord Baltimore*.<sup>1</sup>

The House will not strictly construe this statute in order to defeat the claimant, but will rather strain the language of the statute in order to do justice: *Forbes v. Cochrane*.<sup>2</sup> At all events, the limited construction put by the Judges of the Court below on the words "let right be done," that right is only to be done so far as the statute does not prevent it, will not be supported; nor can it be successfully contended that an Act of Parliament like this is any thing but powerless against a treaty under which rights were vested, and the government took on itself trusts and obligations and duties. The meaning of the royal answer to this petition is, "Let right be done, notwithstanding the Act of Parliament." Now the findings on the inquisition plainly show where the right is, for every material fact expressly put in issue by the law-officers of the Crown has been found in favour of this claimant. The order of the sovereign, given as the answer to the petition, ought, therefore, to be obeyed. But if it is said that that order must be taken with reference to the statute, and that the statute is a bar to the claim, the answer to that is, that the money has not been properly disposed of by the commissioners under the statute. The 16th section of the statute speaks of the money "which shall not have been appropriated to the liquidation of any claims of his Majesty's subjects under the said conventions,"

\* 463 without saying one word limiting \* those claims to such as have been registered; and then it directs that "such money may be brought over to England, for the purpose of being applied to the payment or liquidation of any such claims," — that is, "any claims," as before mentioned, not merely registered claims; "or, in case all such claims shall be paid or liquidated," then, but not till then, for such other purposes as the Commissioners of the Treasury may appoint. Now all the claims had not been liquidated when this money was paid over to the Treasury;

<sup>1</sup> 1 Ves. Sen. 444, 453.

<sup>2</sup> 2 Barnewall & Cresswell, 448, 469.

it was therefore paid over without lawful authority, and, being so, the law will still consider it in the hands of the Crown for the purpose of answering the unsatisfied claim. On payment over of the money, the commissioners' power under the statute was at an end, and by that means the money got into the possession of the Crown, where it can now be reached by this petition of right.

*The Attorney-General* and *Mr. Welsby*, for the defendant in error. — There is no ground of claim which exists here independently of the statute. In the first place, the money was paid by the French government, subject to the condition that the claims should be inquired into by a mixed commission, and also that the claims of any party should be established according to fixed rules. One of these was, that the name of a claimant should be sent in within a certain time, and should be registered. If there had only been sufficient money to satisfy the claims of the registered claimants, the commissioners would have been justified in distributing the sum in hand among those claimants, and as the name of the plaintiff in error was not on the register, he would not have been entitled to any portion of it. The statute recites all these conventions, and authorises certain \* commissioners \* 464 to decide on the claims, and gives, in cases which shall require such a proceeding, an appeal from the decision of the commissioners to the Privy Council. The claimant here has been heard before the commissioners, and likewise before the Privy Council. He has followed the tribunals appointed by the statute, and he has failed; he cannot now say that he is entitled to proceed in a different manner, as if no such statute existed.

The money here claimed never was in the hands of the Crown for the purpose of being available for the petitioner. While the money was in the hands of the mixed commissioners, it cannot be said to have been in the Crown. It was afterwards transferred from the mixed commissioners to the British Commissioners of Liquidation, and then it was necessary to have the Act of Parliament, to direct in what manner it should be dealt with. The Act expressly sets forth the manner of dealing with it, in accordance with the 12th article of the convention, and gives it to those whose names are upon the register, "and no others." The first section, too, authorises the "liquidation of the claims of such persons who shall have caused their names and claims to be duly

inserted in the registers," and the commissioners are empowered to pay the money "to and among the several claimants whose names are duly entered in the said registers." To no other persons had the commissioners any authority to make such payment.

The money, by being paid over by the commissioners, did not get into the hands of the Crown, as trustee for any unsatisfied claimant; it was paid to the Lords of the Treasury for public purposes. But even if the money had so found its way into the possession of the Crown, that would not dispense with the necessity of proving a claim to it in the manner required by the

\* 465 statute. Before it was so \* paid over, the claimant, if he had any legal title to it, had a legal remedy to enforce that title, and there is nothing either in the conventions or the statute, which allows the money to be disposed of, except by such tribunals as are thereby constituted.

[THE LORD CHANCELLOR. — It is admitted law, that if the subject of a country is spoliated by a foreign government, he is entitled to obtain redress from the foreign government through the means of his own government. But if, from weakness, timidity, or any other cause on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country. Here is a compromise of the two governments: the question is, how far his claim is affected by it.]

The question has never been put by the claimant in that way. But if so put, then the answer is, that he has waived any such mode of putting his claim by having preferred it under the terms of the conventions entered into between the two governments. If his case is not within this statute, then he must go on the conventions, and then he is not in a condition to satisfy them.

[THE LORD CHANCELLOR. — Suppose a sum of money to be in the hands of a public officer, destined to a given purpose, and with directions that should there be a surplus, he was to apply it as A. B. might direct; and A. B., before the destined purpose was fully answered, induced that public officer to pay over the fund, by which the officer was rendered incompetent to discharge his duty. Might not a person thereby injured maintain an action against A. B., who had rendered the public officer unable to discharge his duty?]

The only action he could maintain would be an action of

tort, and tort is not maintainable against the Crown ; so  
 \*that the two cases are not analogous. Besides which, the \*466  
 Lords of the Treasury in this case did not act as servants  
 of the Crown, but as a public body, with vested rights, and with  
 duties as against the commissioners.

The claimant here has not complied with the provisions of the  
 Act, and yet he claims a greater benefit than could be obtained by  
 those who did comply with them. To enable him to do so, the  
 argument must go the length of asserting that had he by design,  
 or with fraud, avoided compliance with the rules as to registration,  
 he would still have been entitled to this advantage. No such  
 argument can be maintained. It cannot be contended that the  
 16th section gives the claimant the benefit of the surplus, but that  
 the first does not impose on him any conditions on which alone he  
 is to be entitled to them. The enactments of one are as author-  
 itative as those of the other.

This Act disposes of the money by directing the payment over  
 to the Lords of the Treasury in the character of statutory officers,  
 and the claimant is therefore debarred of the present remedy. In  
 one case,<sup>1</sup> the Commissioners of Woods and Forests, who had taken  
 certain lands expressly in the name of the Crown, were treated  
 as statutory officers, and a mandamus was for that reason granted  
 against them by the Court of Queen's Bench, on the ground  
 that they had a particular statutory duty to perform, and were not  
 the mere servants of the Crown. That case applies here, and shows  
 that the only remedy of the claimant is under the statute.

*Mr. Serjeant Manning*, in reply. — The fact of an adjudi-  
 cation by the commissioners unfavourable \* to the claimant \*467  
 having taken place, is no answer to him here. That adju-  
 dication proceeded on three grounds, two of which have now been  
 found to be false in fact ; the third was false in law.

The omission to register the name was the fault of the commis-  
 sioners; not of the claimant. Now, suppose the Crown had never  
 issued a commission at all, when of course no names whatever  
 could have been registered, surely it cannot be said that that  
 would have barred the right of those who had claims under the  
 conventions.

<sup>1</sup> 15 Q. B. 767 note. See also *The King v. The Lords Commissioners of the Treasury*, 4 Adolphus & Ellis, 286.



The enactments of the statute have not been properly complied with by the commissioners, and they, therefore, or the Crown, whose servants they were, cannot set it up against the claimant, for he did all in his power to obey its enactments; but being by their wrongful or negligent act deprived of its benefits, he is now entitled to avail himself of this common law remedy.

THE LORD CHANCELLOR. — The argument which has been addressed to your Lordships relates to a case the discussion of which has extended over a long period of time, and has involved many intricate questions. But the case, as it is now presented to you, was decided in the Court below on the construction of the 59 Geo. III. c. 31; and if the construction then put on that statute is correct, and is one which you ought to adopt, it goes to the decision of the whole matter. For that reason it was thought right, as a matter of convenience, to call on the counsel to argue that point first. Upon that argument I propose to put the following question to the Judges: "Has an individual, who claims to be entitled to compensation under the treaties mentioned in the Statute of \*468 59 Geo. III. c. 31, or one of them, or under the \*same treaties, or one of them, and the said statute, or under the statute, any other and what remedy, by which to recover such compensation, except by application to the commissioners, and by appeal from their decision to the King in Council, according to the provisions of the statute?" That question will raise the point whether he is barred by what has been done under the statute, and the decision of that point, in one way, may save the necessity of discussing any other question.

The question was put, and agreed to.

THE LORD CHIEF BARON, in the name of the rest of the Judges, required time to answer it, which was granted.

THE LORD CHIEF BARON. — Your Lordships having proposed to the Judges the following question [his Lordship read it, and then said], I have to report to your Lordships the unanimous opinion of the Judges present, that, according to the construction of the statute, all the money received from the French government, by virtue of the treaties or conventions referred to, ought to be ap-

plied according to its directions, and that the suppliant has no claim except under the statute, and in the mode pointed out by its provisions.

We think that there is no foundation for a claim under a petition of right, and we are all clearly of opinion that the statute does dispose of the whole fund, and direct how it is to be applied.

The argument for the suppliant is, that it disposes only of such part of the fund as would be sufficient to satisfy all the claimants whose names were on the register before the passing of the Act, leaving the surplus in the hands of the \*Crown, liable \* 469 to the claims of those British subjects which had been preferred by them within three months, according to the conventions; and that the suppliant's claim, though not entered in the register before the Act, was preferred within three months (two facts found by the inquisition to be true). If such was the construction of the statute, it would be necessary to consider what was the liability of the sovereign of this country and his successors if the Act had not passed. But we are all satisfied that such is not the construction of the Act, but that it meant to provide for the application of the whole fund, and leave no part to be dealt with except under its enactments. Any claimant, therefore, upon the fund, must, in our opinion, proceed according to the provisions of the statute, and has no other remedy.

In answering the question proposed by your Lordships, we have not thought it necessary to state our reasons in detail, because we unanimously concur in the judgment pronounced by the Court of Exchequer Chamber, and in the reasons given for that judgment.

THE LORD CHANCELLOR. — My Lords, the question in this case being simply a question of law, that is to say, the construction of the statute referred to in the opinion of the learned Judges, and the learned Judges having now given to the House their opinion, that, by the true construction of the statute, the only remedy which persons have who make their claim for compensation upon the footing of the particular treaties mentioned in the statute, is according to the provisions of that statute, the whole question raised by the writ of error before your Lordships is disposed of by that opinion. The learned Judges have stated their view of that statute. \* They have referred, \* 470 also, to the judgment of the Court of Exchequer Chamber,

in which the reasons upon which that construction is founded are contained more at large. Upon such a question, and under the circumstances, having the unanimous opinion of the Judges, it does not appear to me that any thing can be added which would elucidate the question or the propriety of the opinion of the learned Judges. I shall therefore recommend to your Lordships that, in this case, the appeal should be dismissed, and the judgment below be affirmed.

Agreed to.

*Judgment for the defendant in error.*

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LONDON AND BLACKWALL RAILWAY COMPANY v. LETTS.

1851. March 4, 10; August 8.

THE PROPRIETORS of the LONDON AND BLACKWALL } *Appellants.*  
RAILWAY COMPANY, . . . . . }

AND

THE REV. JOHN LETTS, . . . . . *Respondent.*

*London Tithes. Railway. Compensation. Practice. Costs.*

By the Statute 37 Hen. VIII. c. 12, the inhabitants of certain parishes in the city of London, therein mentioned, are to pay tithes at the rate of 2s. 9d. in the pound on their rent. By the 2 & 3 Vict. c. 95 (the Blackwall Railway Act), where houses in any of these parishes (of which St. Olave's, \*471 Hart Street, is one) shall be taken for the \*purposes of the railway after the occupiers shall have quitted their houses, and "until new houses or other buildings shall be erected, and occupied, of such annual rent or value, that the tithes of such new houses shall be equal to the tithes payable for the houses quitted, the tithes, or payments in lieu of tithes, payable in respect of the houses quitted (according to the last assessments thereof to the 25th March, 1839), or annual sums of money equal to the loss in tithes which the rectors may sustain by the taking down of such houses, shall be paid and payable to the said rectors," &c. The company removed a great many houses, and built two others, which were at once occupied:—

*Held* (reversing a decree of Vice-Chancellor Wigram), that the object of the Act was only indemnity to the clergy; that therefore the clergy were entitled to receive only what they would have received if the railway company had never interfered with the premises; that the company was liable to pay in respect of houses removed (where no others had been built in their places) such sums as were actually paid to the rector, whether by agreement or other-

wise, up to the 25th of March, 1839; that the amount before then agreed upon between the rector and the occupant, and paid by the occupant, constituted the "assessment" within the meaning of the Act, and that the amount of compensation must be measured thereby: and further, that, where new houses had been built and occupied, the company was entitled to be credited (in reduction of its general liability to make compensation under the Act) with the sums which had become payable in respect of such new houses, and not merely with those which had been actually received therefrom.

A decree directing a reference to the Master to make certain calculations on bases laid down in that decree was made in 1847. The decree was not then appealed against; the inquiry took place in the Master's office, and he made his report, which the defendants in the suit excepted to; these exceptions were overruled, and the report confirmed; but no costs were given on either side. After these proceedings had taken place, the defendants appealed to this House against the decree itself. The decree was reversed, and the cause remitted, with directions; but no order was made as to the costs \* in- \* 472  
 curred in the Court below between the date of the decree and of the appeal, the Court below being left to deal with them as it might think fit.

THIS was an appeal against a decree of Vice-Chancellor Wigram,<sup>1</sup> pronounced in a suit for compensation for tithes lost by the Rev. John Letts, the rector of the parish of St. Olave, Hart Street, in the city of London, in consequence of the demolition, by the London and Blackwall Railway Company, of certain houses in his parish. The tithes were claimed as payable according to the Act of 37 Hen. VIII. c. 12,<sup>2</sup> entitled "An Act for Tithes in London," and the compensation for the loss of them was claimed under the Blackwall Railway Act, 2 & 3 Vict. c. 95. The bill set forth the following facts. By a decree made \* on the 24th \* 473

<sup>1</sup> 5 Hare, 605.

<sup>2</sup> The third section enacted, "That where any lease is or shall be made of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, by fraud or covin, reserving less rent than hath been accustomed or is, or that any such lease shall be made without any rent reserved upon the same, by reason of any fine or income paid beforehand, or by any other fraud or covin; that then in every such case the tenant or farmer, tenants or farmers thereof shall pay, for his or their tithes of the same after the rate aforesaid, according to the quality of such rent or rents, as the same house or houses, shops, warehouses, cellars, or stables, or any of them, were last letten for, without fraud or covin, before the making of such lease." The fourth section declared, "That every owner or owners, inheritor or inheritors, of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, within the said city and liberties, inhabiting or occupying the same himself or themselves, shall pay after such rate or tithes as is above said, after the quantity of such yearly rent as the same was last letten for, without fraud or covin."

of February, 1545, by the then Archbishop of Canterbury, the Lord Chancellor and certain other persons, appointed by the Crown and enrolled in Chancery, and which was declared by the Statute 37 Hen. VIII. c. 12, to have the authority of an Act of Parliament, it was ordered that the citizens of London should pay for tithes at the rate of 2s. 9d. in the pound on their rent.

The 2 & 3 Vict. c. 95, reciting previous Acts passed for the establishment of a company for making the Blackwall Railway, and for giving to the company the necessary powers to take land, &c. proceeded by the 33d section to make provision for indemnifying the rectors of the several parishes therein mentioned (and amongst others the rector of the parish of St. Olave, Hart Street) against such loss as might otherwise accrue to them respectively by reason of the company taking down or using, under the powers of the Blackwall Railway Acts, any houses or other buildings in any of the said parishes. For this purpose it was enacted, "That after the occupier or occupiers of any of the houses or other buildings to be taken down for the purposes or under the powers of the said recited Acts, within the said parishes, or any or either of them, shall have quitted the possession thereof in pursuance of the Acts, or in pursuance of any notice given for that purpose, under the said Acts, and in the mean time, and until new houses or other buildings shall be erected, completed, and occupied, on the ground which shall be cleared, under any of the provisions of the Acts, within any of the said parishes, of such an annual rent or value that the tithes, or yearly sums of money by way or in lieu of tithes, for the time being actually payable for such new houses or other buildings, shall be fully equal to the tithes, or yearly sums of money by way or in lieu of tithes, payable for the houses or

\* 474 other buildings so for the time being quitted by the \* occupiers thereof, as aforesaid, within the said parishes, the tithes or yearly sums of money, or customary payments in lieu of tithes, payable in respect of the houses or other buildings within any of the said parishes which shall be so quitted as aforesaid (according to the last assessments thereof to the 25th day of March then last),<sup>1</sup> or annual sums of money equal to the loss in tithes, or sums of money or customary payments in lieu of tithes, which the said rectors and impropiators, their respective successors, &c. may

<sup>1</sup> The Act was passed on the 17th of August, 1839.

sustain by the want of occupiers in or by the taking down of such houses or other buildings respectively, estimated as aforesaid, shall be paid and payable to the said several rectors, &c. out of the monies to be applied for the purposes of the Act," on the four usual quarter-days ; the first payment to be made on such of the quarter-days as should first happen after the occupier of any such house should have quitted the same ; " and such sums of money to be paid and made good as aforesaid shall diminish in proportion to the tithes, or yearly sums of money by way or in lieu of tithes, which shall for the time being be actually payable for new houses or other buildings erected and occupied on ground which shall be so cleared as aforesaid." The bill further stated, that under the powers of the Railway Acts, the defendants took houses and premises in the parish of St. Olave, Hart Street, and cleared the ground of the buildings then upon it, and also erected two new houses, which were soon afterwards occupied, and likewise some warehouses attached to the railway ; and the bill alleged that the new houses and other buildings so erected were not of such an annual rent or value that the tithes payable for the same were equal to the tithes payable for the houses which had been taken by the defendants according \* to the last assessment there- \* 475 of, to the 25th of March, 1839, but on the contrary, they were of much less annual rent or value. The bill then stated, that before the passing of the 2 & 3 Vict. c. 95, the annual value of the said premises was from time to time assessed by agreement between the rector and the occupiers respectively ; the last assessment, except as to certain specified houses, having been made in the time of Dr. Butts Owen, the plaintiff's predecessor, who, however, did not enforce payment of the full amount of tithes in all cases, but remitted to the several occupiers (except public companies or public officers) parts of such tithes, without, however, precluding himself in any way from enforcing in future payment of the full amount. The plaintiff received from each occupier the same amount that had been paid to his predecessor until any change of occupation took place, and upon such change he caused a new assessment to be made of the annual value of the premises by agreement between himself and the new occupier. On the defendants taking possession of the land, differences arose between the plaintiff and the defendants as to the sum payable for compensation for tithes, the defendants insisting that they were only liable

to pay the same yearly sums for tithes which the plaintiff had actually received from the former occupiers, and not the full rate of 2s. 9d. in the pound on the annual value of the premises, according to the last assessment thereof to the 25th of March, 1839. An amended bill was afterwards filed, in which the particular instances where the plaintiff claimed and received the full amount of 2s. 9d. in the pound were set forth. The bill prayed that the defendants might be declared liable in respect of all the houses which the defendants had taken, to pay him the sum of 2s. 9d. in the pound on the annual value of the premises, according to the last assessment thereof to the 25th of March, 1839, either to the poor's rate

\*476 \*or by agreement as aforesaid, to commence from the quarter-day preceding the time when the premises were taken, and subject to deductions in respect of houses left standing or new houses built, and for a reference to the Master to take an account, and for further directions and relief.

The defendants put in an answer to the original bill, and to the amended bill, and filed a cross bill, in which, among other things, they charged that annual payments had been received by the rectors of St. Olave, Hart Street, at a rate below 2s. 9d. in the pound on the annual value thereof; that the premises taken had been the subject of special agreement between the rector and the former occupiers, and had been assessed on a value fixed by such agreement; and it was prayed that it might be declared that the rector was only entitled to demand in respect of the premises taken under the powers of the Railway Acts, tithes, or sums in lieu of tithes, after such rate, and upon such value as might have been agreed upon between the occupiers of any houses in the parish and the rectors of the parish and the respondent, in particular or after such rate, and upon such value as the several premises might, in the terms of the Act of the 2 & 3 Vict. c. 95, have been assessed to the 25th of March, 1839.

The rector put in an answer to this cross bill, and replications were filed in both causes.

The original and cross causes came on for hearing before Vice-Chancellor Sir J. Wigram on the 12th of January, 1847, and on the 30th of that month his Honour made a decree,<sup>1</sup> by which it was declared that, subject to a deduction thereafter mentioned, the rector was entitled to tithes after the rate of 2s. 9d. in the pound on

<sup>1</sup> 5 Hare, 605-616.

the annual values of houses and other buildings taken by the defendants, as such annual values had been agreed on between the rector, \* for the time being, and the respective occupiers \* 477 before Lady Day, 1839; and a reference was made to the Master, who was to state what houses had been taken, and their annual values according to the last agreements, and in case as to any of the houses no such agreement should be proved, then the Master was to take the annual sum last collected by way of tithe thereon as representing 2s. 9d. in the pound on the annual value thereof; and the Master was to take an account of what was due, having regard to the declaration and inquiries aforesaid. The Master made his report, which was excepted to; but (save as to certain items which did not at all involve the question of the construction of the Act) the report was, on the 17th July, 1848, confirmed. No costs were given. The present appeal was brought against the decree of 30th January, 1847, and against the order of the 17th July, 1848, confirming the report made thereon.

*Mr. P. Wood* and *Mr. Bigg*, for the appellants. — The Statute of Hen. VIII. and the 2 & 3 Vict. c. 95, must be construed together; and so construed, it is clear that the Vice-Chancellor was wrong in directing the Master to ascertain the value of the premises in the manner and for the purpose mentioned in the decree. Rent, and not value, is the criterion by which the tithe is to be settled: *The Minor Canons of St. Paul's v. Crickett*.<sup>1</sup> *MacDougall v. Purrier*<sup>2</sup> shows that to have been the criterion ordinarily adopted in cases arising on the Statute of Hen. VIII. The compensation for loss of tithes under the Blackwall Railway Act must be ascertained in the same way.

Then with respect to the compensation granted by the Blackwall Railway Act 3 Vict. c. 95, it is clear that no more than an indemnity was intended to be given to the \* rector when the \* 478 legislature fixed the rule by which the compensation for loss of tithes during the progress of the works of the company was to be ascertained. That indemnity is to be calculated on the sums which the rector actually received from the former occupiers, whether they were received under agreement between himself and those occupiers before the 25th of March, 1839, or without such

<sup>1</sup> 2 Ves. Jun. 563, and again 3 Eagle & Younge, 866; 5 Price, 14.

<sup>2</sup> 2 Dow & Clark, 135.



agreement. The compensation cannot be calculated in one instance on the value of the houses, and in the other upon the assessment of them made for the poor's rate; for that would be to give two varying modes of calculation, and would afford the rector more than an indemnity.

The Vice-Chancellor was wrong in the construction he put upon the phrase "according to the last assessment." That word "assessment" does not mean the sum agreed upon by the rector and the proprietor to be the value of the premises; but the sum which the rector actually received or levied for tithes. Such is clearly the meaning in all the statutes relating to the poor, and such is the meaning given to the word in Johnson's Dictionary. Putting this well-established construction upon the word, it follows that the sum actually received by the rector up to March, 1839, is that alone for the loss of which he is to be indemnified.

Then again, certain new houses have been built by the appellants, and have been occupied. The Master has only taken into his calculations the tithe actually received from those houses, whereas he ought to have taken the sums which, according to the rent of those houses, were legally payable on account of them; for otherwise the rector and the occupier might, by arrangement between themselves, throw a larger liability on the company, which is by the terms of the Act discharged from liability to make compensation as soon as the new houses are occupied.

\* 479 *The Attorney-General (Sir J. Romilly) and Mr. Speed,* for the respondent. — The Statute 37 Hen. VIII. c. 12, gives the rector a title to receive a fixed sum on the rent of premises within his parish. That right cannot be affected by his receiving from certain occupiers, under particular circumstances, less than he is entitled to demand. The provision, that notwithstanding any lease or any fine, he is to receive tithe on what the premises were "last letten for," is intended to protect him against a diminution of his legally settled income in whatever way occasioned.

It may be admitted that the Act of 3 Vict. c. 95 was intended, so far as the clause for giving compensation during the progress of the works (the 33d) is concerned, to be an Act for indemnifying the rector; in the same manner the Tithe Commutation Act (6 & 7 Wm. IV. c. 71) was intended to be an Act of indemnity;

but then it was to be an indemnity against injury to legal rights. This Railway Act must likewise be so construed; and is not to be limited to the sums which, for reasons of charity or for purposes of good-will, the respondent had thought fit to accept in lieu of his legal demands. Suppose, because of the poverty of a particular occupier, he took no tithe at all, that would not be a bar to his afterwards demanding tithe, should the occupier become capable of paying, or should another occupier succeed to the house. The Vice-Chancellor was, therefore, right in directing that where there had been an agreement with the former occupier, the appellants should pay at the rate of 2s. 9d. in the pound on the annual value of the houses thus previously agreed upon, and then taken under the Railway Acts and used for the purposes of the railway; for the annual value was the true test of the amount of legal liability, \* which alone is a matter for con- \* 480 sideration under the statute. The Vice-Chancellor was also right in directing, that where there had been no agreement, the Master should take the last sum collected by way of tithe as representing 2s. 9d. in the pound on the annual value. Where an agreement existed, it gave the basis of the calculation on which the statutory liability attached; where none existed, the money actually received supplied the only means of calculation. The compensation is to be paid for what the rector has lost in point of law, and the annual value of the premises taken shows that loss in the only complete and satisfactory manner. Though in the Statute of Hen. VIII. the word "rent," and not "value," is used, still that word has been construed to be not merely "reserved," but "estimated" rent: *Grant v. Cannon*<sup>1</sup> and *Antrobus v. The East India Company*.<sup>2</sup> In the latter of these cases, the Master of the Rolls, commenting on the former, where the same question had been raised, said:<sup>3</sup> "I do not understand the Court to mean that, where there is a yearly rent, recourse should be had to the value; but the meaning is, that the defendant is to account according to the rent, if there is rent, and according to the value, if there is no rent. The Court understands the true construction of the statute to be, that the word 'rent' may bear the double sense of 'reserved' and 'estimated' rent." The rule thus laid down was acted on in *Vivian v. Cochrane*,<sup>4</sup> where the value of buildings

<sup>1</sup> 1 Eagle & Younge, 582.

<sup>2</sup> 2 Eagle & Younge, 550; 13 Ves. 23.

<sup>3</sup> 2 Eagle & Younge, 544; 13 Ves. 9.

<sup>4</sup> 4 Hare, 167.

being much increased, on a new lease, the tithe was held to be payable not on the mere rent reserved by the lease, but on the full annual value. Those cases, no doubt, related to the construction of the Statute of Hen. VIII.; but that circumstance does

\* 481 not affect their value as authorities \* here, for the Railway Act is to be construed as if forming part of that statute.

Besides which, if there can be a doubt as to the construction of the Railway Act, which gives the rector an indemnity, then the House must apply to its construction the principle of law that Acts obtained by parties for their own advantage must be construed most strongly against themselves: *Glamorganshire Canal Company v. Blakemore*.<sup>1</sup>

The decree is right in directing the Master to take the money actually received for the newly built houses as the amount which he is to set off against the general liability of the company to make compensation. The rector can have no interest in making an arrangement with the occupiers of these houses injurious to the appellants. It is entirely indifferent to him whether he receives his tithe from the occupiers or a compensation for it from the appellants. Indeed his interest is to diminish the amount of compensation, which is merely temporary, and to make the amount of permanent tithe charge as large as possible.

*Mr. P. Wood*, in reply. — The Vice-Chancellor was wrong in taking 2s. 9d. in the pound as a fixed sum payable on all titheable property in the parish, and then directing the value of the houses to be ascertained, and applying that fixed sum to such value, for value is not by the statute made the criterion in such a case. Rent alone is mentioned in the statute. The rent paid, or that which the rector and occupier have agreed to assume as the rent, must be taken; and so taken, the observation in *Antrobus v. The East India Company*<sup>2</sup> is not unfavourable to the appellants, for the rent paid and the rent “reserved” must be treated as the same thing, and the rent agreed on between the rector and

\* 482 the occupiers answers \* the description of the “estimated” rent. The authority of the case of *Vivian v. Cochrane*<sup>3</sup> may be doubted.

<sup>1</sup> 1 Clark & Finnelly, 262.

<sup>3</sup> 4 Hare, 167.

<sup>2</sup> 2 Eagle & Younge, 550; 13 Ves. 28.

THE LORD CHANCELLOR. — This case, my Lords, is before the House by way of appeal against a decree pronounced by the late Vice-Chancellor Sir James Wigram, in a cause in which the Rev. John Letts, the rector of the parish of St. Olave, Hart Street, City, was the plaintiff, and the proprietors of the Blackwall Railway the defendants. The plaintiff by this suit seeks to obtain a decree for the payment of a sum of money, by way of compensation in lieu of tithes, under the provisions of the Act 2 & 3 Vict. c. 95, intitled “An Act for extending the Line of Railway between London and Blackwall called the ‘Commercial Railway,’ and for amending the Acts relating thereto.” By that Act a company, which had been incorporated by the 6 & 7 Wm. IV. c. 123, was authorised to construct a railway from certain parts of the city of London to Blackwall. In the 33d section of the Act 2 & 3 Vict. c. 95, a provision was contained for indemnifying the clergy in the parishes in the city of London through which the intended railway was proposed to pass for the loss of the money payments in lieu of tithes, which they would sustain by the removal of buildings by the railway company. Two questions arose for decision in the suit; the one whether the rector was entitled to a decree for the payment of 2s. 9d. in the pound upon the annual value or rent of the premises which the company had removed under the authority of the Railway Act, during the period the ground remained vacant, and therefore not liable to assessment in respect of tithes; or whether the rector’s right during that period was limited to a payment \* according to the rate which had been \* 483 paid for the quarter ending at Lady Day, 1839, by the occupiers of the premises which had been removed. Secondly, whether the liability of the company in respect of the premises which had been removed was continued until any newly erected or substituted premises should become productive to the rector, or only during the time the ground from which the premises had been removed and the newly substituted premises should not be liable to assessment. Upon the first point, the decree of the Vice-Chancellor, in all cases where there had been no agreement as to the amount of rent between the rector and the occupier relative to the rate to be imposed, or to the rent or value of the premises, subjected the company to a liability after the same rate as the occupiers of the removed premises had paid during the quarter ending Lady Day, 1839; but where the payment up to Lady Day,

1839, had been regulated by agreement between the rector and the occupier, the decree directed that the company should be charged by a rate of 2s. 9d. in the pound upon the agreed value or rent of the premises. Upon the second point, the decree directed the company to be charged after the rate before mentioned, subject to a credit or deduction of so much money as the rector should actually have received in respect of any newly erected premises. Against this decree the company appealed; and the questions to be decided by your Lordships depend upon the construction of the 33d section of the Act 2 & 3 Vict. c. 95. Among the parishes through which the appellants were authorised to construct their railway was the parish of St. Olave, Hart Street, and for that purpose they were authorised to remove such buildings as should be necessary. The removal of those buildings would necessarily diminish the income of the rectors of the several parishes, and therefore the 33d section of the \* Railway Act was enacted to indemnify them in respect of such diminution.

Before submitting to your Lordships what seems to me to be the correct construction of that section, it may be convenient that I should state the facts to which that construction is to be applied. Your Lordships are aware that in the city of London, in lieu of tithes, the incumbents of the several parishes, by virtue of a decree made under the authority of the Statute 37 Hen. VIII. c. 12, are entitled to a money payment after the rate of 2s. 9d. in the pound upon the houses and buildings within their respective parishes. The decree is dated the 24th February, 1545, in the 37th year of the reign of King Henry VIII. In the course of various judicial proceedings it has appeared that the decree was very partially acted upon until within a very recent period. The payments up to that time were made according to agreement between the occupiers and incumbents of their respective parishes, fluctuating between 6d. and 1s. in the pound upon stipulated amounts. Your Lordships may also perhaps be aware that no questions ever came before courts of justice upon which such uncertain and contradictory evidence is given as upon the value of houses in the city of London. When the proposed indemnity was to be provided for, it was therefore to be expected that the parties interested would be desirous of adopting some rule or test by which a proper amount of indemnity could be ascertained or regulated, without

resorting to any disputable, and possibly litigious, course of ascertaining, in each instance, upon what amount and after what rule the compensation would be assessed. In the parish of St. Olave, Hart Street, the money payments in lieu of tithes during the incumbency of the former rector had been regulated by agreement. The present rector continued to collect after the same rate as his predecessor had done, until a change took place in the occupation, and upon such a \* change he came to an agree- \*485 ment with the new occupier as to the amount upon which the assessment should be made, and then took 2s. in the pound upon the agreed sum, except where the occupation was by a public company, and of such company he claimed the full 2s. 9d. upon the agreed rent.

In considering what is the correct construction of the section in question, the object of the enactment should be borne in mind; and that object was, to give indemnity, and indemnity only, to the incumbents of the different parishes; and that purpose would be accomplished by the company paying to the clergy just as much as the clergy would have received if the railway company had never interfered with the premises, which the company in fact did remove. It may also be observed, considering the class of buildings in the part of the parish through which the railway was proposed to pass, that any new buildings which should be erected by the company would probably be of a superior description, and of a much higher annual value than the buildings which were to be removed, and that the permanent effect of the execution of the company's works would therefore be materially to increase the income of the clergyman. It was, however, certain that after the then existing buildings should be removed, there would be an interval during which there would be an interruption in or a suspension of such income. There can be no doubt that the section in question was intended to embody and express an agreement come to among the parties, and sanctioned by the bishops and by Parliament; and the substance of that agreement seems to be, that, after the occupier of the premises to be removed should have quitted possession, the yearly sums of money in lieu of tithes payable in respect of such premises, according to the last assessment thereof to the 25th March, 1839, equal to the loss which the clergy might sustain by the want of the occupiers, estimated as

\* aforesaid, should be paid to the clergy by the company, \*486

at the times therein mentioned. The language thus used *prima facie* imports that the sums for which the clergy were entitled to be indemnified were those sums which, according to the assessment to the 25th March, 1839 (the last quarter of the previous tithe year), would have been receivable by them during the interval of the removal of the old buildings and the construction of the new buildings which would be liable to tithes. Plain, however, as these words appear to be, the whole dispute is as to their meaning. It occurs to me, that proof that certain sums had been demanded by the clergy, and paid by the occupiers, would, within the meaning of the Act, have conclusively proved what had been the assessment of the occupiers so paying to the 25th March, 1839; and upon these facts there does not appear to have been any dispute or uncertainty; but the question raised is, what was meant by the word "assessments" in the sentence which expresses that yearly sums of money, payable according to the last assessments thereof to the 25th March, 1839, equal to the loss which the clergy might sustain by the want of occupiers of the buildings taken down, estimated as aforesaid, should be paid by the company? The respondent, the rector, has claimed to be entitled to be paid 2s. 9d. in the pound upon the alleged annual value of all the premises removed by the company during the period of the ground being unoccupied. The appellants, on the other hand, contend that they are liable only to pay such sums as the occupiers of the premises removed would have paid during the interval referred to, according to the assessment of the 25th March, 1839, if their occupation had not ceased. The decree appealed against decided, as I have before stated, that in all cases where it could be proved that the amount of rent had been agreed upon, the rector

was entitled to receive 2s. 9d. in the pound assessed upon  
 \* 487 such agreed rent or \*value; but that in respect of other premises where no agreement could be proved as to the rent

or value, the company was liable to pay only after the rate which had been paid to the 25th March, 1839. I cannot advise your Lordships to adopt that construction of the Act. The Vice-Chancellor held that the word "assessment" did not refer to the assessment for the poor rate; in which I think he was clearly right. The amount of rent attached to any premises liable to be rated to the poor did not constitute the assessment; but the sum charged in respect of such amount or value constituted the assess-

ment, and that assessment, it is quite clear, could not form the basis of compensation for loss of tithes.

The learned Judge's course of reasoning appears to have been, that where a sum was paid in respect of tithes to the 25th March, 1839, without proof of any prior agreement, the amount so paid ought to be taken as the assessment referred to in the Act of Parliament, although that sum was less than 2*s.* 9*d.* in the pound upon the admitted amount of the rent or value; but where there had been any agreement as to the amount of rent or value, though the rector had taken 2*s.* in the pound upon that amount, he (the Vice-Chancellor) should not hold payment after such rate to be proof of an assessment, but should hold the receipt of 2*s.* in the pound by the rector, instead of 2*s.* 9*d.*, to be merely a voluntary remission or reduction, and that the amount of the rent being agreed, the law made the assessment at 2*s.* 9*d.* The reasoning for this conclusion seems to me vague and unsatisfactory, and the conclusion wrong. The parties must have acted upon the assumption, when the Act passed in the summer of 1839, that there had been in fact some arrangement throughout the parish by which the amount of tithes to be paid to the 25th March preceding had been understood, agreed, and settled, and such arrangement, by consent, was denominated an assessment; and as it would

\* be proved by actual payment, it constituted a definite and \* 488 certain test, excluding the necessity of inquiring as to the value of the premises, the amount agreed to be received, or any other fact than the actual payment and receipt. But, according to the argument of the respondent, when the Act passed, he agreed to be compensated by an assessment to the 25th March, 1839, when he knew no such assessment had been made. The company could not object to being bound to pay compensation for loss arising from the removal of occupiers, after the rate which those occupiers had actually paid during their occupation; but if the rector had insisted that that was not a just rule of compensation, because those payments had been reduced by indulgence and consent below what he was entitled by law to receive, I have no doubt that some distinct enactment would have been adopted to preclude the possibility of dispute as to the rent or value of every house in the parish. The fact was apparent, that the rector had never, to the 25th of March, 1839, received 2*s.* 9*d.* in the pound from any of the occupiers except corporations and public companies, and there was no



reason to believe that he would have received after that rate during the period for which compensation was to be made, if the occupation had remained undisturbed by the company; and as I infer from the terms of the statute, that it was the object of the legislature to give indemnity to the clergy, and no more, a construction of the section which would subject the company to the payment of a greater amount than the rector would have received if the company had never existed does not appear to me to be consistent with that purpose. In order to carry the intention into effect, the measure of indemnity refers to a test which seems well adapted to the purpose; that test being the rate and computation which had been adopted by the rector and the tithe-payer previous to the establishment of the company, and which there

\*489 was no \*reason to suppose would have varied during the interval for which compensation would have to be computed. The Act has denominated that test and computation the "assessment," and the question is, whether any thing existed to which the word "assessment" can properly be referred. I think there did, and that the amount claimed by the rector, and paid by the occupier, to the 25th of March, 1839, constituted the assessment intended by the Act. Compensation according to that test would, I think, not only be a just rule, but the only just rule, and was at the same time the best calculated to accomplish that object which all the parties, when before Parliament, would profess to desire, viz. to exclude uncertainty and litigation; and for these reasons the decree, I think, is not warranted by the statute, and gives to the rector more than an indemnity, as it gives 2s. 9d. in the pound, when, if the company had not existed, it is clear the rector would only have received 2s. in the pound, or even less; and it gives 2s. 9d. in the pound upon amounts larger than the rate would have been calculated upon if the occupation had continued undisturbed. Having come to the conclusion that the learned Vice-Chancellor has not put a correct construction upon the section in question, I recommend your Lordships to reverse the decree founded upon such erroneous construction, and that the cause be remitted, with a direction in conformity with the construction of the statute which I have presumed to submit to the House.

The decree appears to be erroneous also in this respect. The company was to continue liable to indemnify the rector in respect

of the buildings removed until other buildings upon the same site should be constructed and become liable for tithe rent, when the liability of the company was to cease in proportion to the sums which would become payable to the rector by the construction of such new buildings. The decree directs the amount payable by the company to be credited \* only with the sums \*490 actually received by the rector in respect of such newly constructed buildings, and does not direct, as it ought to have done, that the company should be credited with the sums which have become payable in respect of such premises. I think the decree should be reversed in this respect; and while the company should be charged for the interval during which compensation is payable, according to the payments by the respective occupiers to the 25th of March, 1839, credit should be allowed to the company for such tithe rent as should have become payable in respect of the new buildings. I have the authority of Lord Brougham, who heard this case argued, but who cannot now be present to state his opinion, that he entirely concurs with the recommendation I have submitted for the adoption of the House.

Decree or order of the Court below reversed, and case remitted, with directions.

*Mr. Speed* inquired whether the costs incurred in the Master's office after the decree ought not to be paid by the appellants. The decree was pronounced in 1847; the appellants had allowed the inquiry directed by that decree to go on, although, as it now appeared, they intended to appeal against that decree. Accounts had been taken, and likewise exceptions, to the Master's report, and the appeal against the original decree was not brought till 1849.

THE LORD CHANCELLOR thought that there was no ground for calling on the appellants to pay costs under a decree which was now declared to be erroneous; but whether they might be entitled to receive them under the circumstances now stated, was a different matter.

*The Solicitor-General*<sup>1</sup> (*Sir W. P. Wood*) suggested that no orders should be made as to these costs. The original decree of the Vice-Chancellor gave no costs on either side, \* his \*491 Honour being of opinion that there was sufficient doubt as

<sup>1</sup> Mr. Page Wood was appointed Solicitor-General in the vacation after Hilary Term, 1851, and was shortly afterwards knighted.

to the construction of the Railway Act to justify the company in bringing the case before the Court. He submitted that part of the order of the House, in remitting the case, should direct that these costs should be reserved, which would leave them in the discretion of the Court below.

THE LORD CHANCELLOR. — I think that would be, under the peculiar circumstances of this case, the most correct course to pursue.

The following order was afterwards entered on the Journals: Ordered, — That the said decree and order in the said petition and appeal complained of be, and the same are hereby reversed. And it is hereby declared, that, according to the true intent and meaning of the 2 & 3 Vict. c. 95, the last assessments to the 25th day of March then last, therein mentioned, were the payments made to the said rector in lieu of tithes for a period up to and ending on the said 25th day of March, therein mentioned; and that in taking the accounts between the appellants and the respondent, the appellants should be credited with all sums paid by them to the respondent for tithes, and also with all sums of money in lieu of tithes, which have become payable to the respondent, by any person or persons, other than the appellants, in respect of the premises which may have been taken by the said appellants under the powers and authorities of the said Acts: and it is further ordered, that with this declaration the cause be referred back to the Court of Chancery to do therein as shall be just, and consistent with this declaration and judgment. — Lords' Journals, 1851, p. 514.

\* 492

\* ELLCOCK v. MAPP.

1851. February 25, 28; August 5.

MARGARET ELLCOCK, *Appellant*.ELIZA MAPP, *Respondent*.*Executor. Residue. Trust.*

A testator devised "all my estate, both real and personal, to E. E., his executors, administrators, and assigns, to and for the several uses, intents, and purposes following; that is to say"; — and then, after specifying various objects of his

bounty, appointed "the said E. E. executor of this my last will and testament." The trusts of the will did not exhaust the estate: —

*Held*, affirming a decree of Lord Chancellor Cottenham, that E. E. did not become entitled, for his own benefit, to the personal estate undisposed of, but was a trustee thereof for the widow and next of kin of the testator, according to the Statute of Distributions.

*Dawson v. Clark*, 18 Ves. 247, commented on, and Lord Eldon's opinions adopted.<sup>1</sup>

The rule in such a case is, that where there appears a "plain implication or strong presumption" that the testator, by naming an executor, meant only to give the office of executor, and not the beneficial interest, the person named shall be considered a trustee for the next of kin of the undisposed surplus.

. THIS was an appeal against an order of Lord Chancellor Cottenham, which had reversed an order of the Vice-Chancellor of England in a suit instituted for the administration of the estate of a testator, and a declaration of the true construction to be put upon his will.

Samuel Henry Pare, Esq., of Barbadoes, made his will in that island, dated 2d July, 1785, in the following terms: "I give all my estate, both real and personal, in this island or elsewhere, to Edward Ellcock, Esq., of, &c. his executors, administrators, and assigns, to and for the several uses, intents, and purposes following; that is to say, out of the rents, issues, and profits, and interest of all debts due to me, to pay unto my dear wife, Anna Maria, 300*l.* yearly and every year, in addition to her own fortune, which survives to her; and in trust, likewise, to permit and suffer her to have the full enjoyment of the uses and services \* of all \* 493 my negro slaves, except Jackey, whom I direct to be freed at the expense of my estate; and in trust, also, to permit and suffer her to use all my household furniture and plate during her natural life; and in trust, also, to receive the interest only of the debt due to me from John Prettejohn, Esq., during the lives of the said John Prettejohn, and of his son and daughter, Charlotte and John; and in trust, likewise, to discharge the said John Prettejohn from the sum of 2500*l.*, which sum I bequeath unto his said two children, and in case of their deaths, to the aforesaid John Prettejohn himself; and in trust, also, to divide the remainder of the interest of debts due to me in the following manner, in equal proportions between H. E. H. Parris, Margaret Ellcock, and Anna Maria Ellcock, daughters of the aforesaid Edward Ellcock; and in

<sup>1</sup> *Enohin v. Wylie*, 10 House of Lords Cases, 1, 6.

case my wife, Anna Maria, should intermarry and have children, in trust to divide the principal sums among such of her children as shall be living at the death of the aforesaid John Prettejohn, senior, Charlotte Prettejohn, and John Prettejohn, junior, and in the mean time to divide one principal sum of 1500*l.*, part of the debt due to me from the estate of the Honorable Samuel Rous, deceased, among and between the aforesaid H. E. H. Parris, Margaret Ellcock, and Anna Maria Ellcock, on the death of the aforesaid Anna Maria, my said wife. If there should be any doubt of the legality of the above trust for the use of the children of my present wife by a future marriage, I then give such sum or sums as would have been their share or shares unto herself, upon such events as are before mentioned. Lastly, I nominate, constitute, and appoint the aforesaid Edward Ellcock executor of this my last will and testament."

The testator died in England, on the 22d October, 1789, leaving all the persons named in his will him surviving.

\* 494 \* The will was duly proved by Edward Ellcock in Barbadoes, and the executor took possession of all the testator's property there. The debt owing by Mr. Prettejohn was secured on his estate called Constant, and after deducting the sum of 2500*l.* therefrom, amounted to 4411*l.* 19*s.* 3*d.*, to which extent the estate remained charged.

H. E. H. Parris died in 1795, intestate. Elizabeth, the wife of the Honorable Samuel Rous (mentioned in the will), was, at the time of the death of the testator, his only next of kin, according to the Statute of Distributions. She survived her husband, but died in 1796, having appointed her daughter her executrix. The daughter died in 1811, having by will appointed as her executrix Eliza Mapp (the present respondent), who proved the daughter's will, and took out letters of administration in England to the estates of both H. E. H. Parris and Elizabeth Rous, of whom she became the sole legal personal representative.

Edward Ellcock died in England in 1798, and appointed his wife his executrix, and by her his will was proved in England. In 1800 she took out letters of administration to his estate in Barbadoes. Mrs. Pare died in 1824, without having been again married, and intestate; and Mrs. Ellcock, who was her sister, took out letters of administration to her. In 1825 Mrs. Ellcock likewise obtained letters of administration, with the will annexed, to the

estate of the testator, Samuel Pare. Mrs. Ellcock died in December, 1831, having appointed Margaret Ellcock (the present appellant) her executrix. Margaret Ellcock proved her mother's will in England, and obtained in Barbadoes letters of administration to the estate of the testator, and similar letters in England to the estate of Mrs. Pare; and thus became the representative of Mr. and Mrs. Pare, and of Mr. and Mrs. Ellcock.

Charlotte and John Prettejohn, the son and daughter \* mentioned in the will, were still alive when the suit was \* 495 commenced.

Eliza Mapp, in April, 1837, filed her bill in Chancery, for the purpose of having the estate of S. H. Pare administered, and the true construction of his will declared.

The case was heard before the Vice-Chancellor of England in March, 1845, when his Honour made a decree, directing that it should be referred to the Master to inquire who was the next of kin of the testator; and on the Master making his report, the cause came on for further directions, when his Honour, on the 26th April, 1847, declared that, according to the true construction of the will of the testator, S. H. Pare, the said Edward Ellcock, the executor, was not a trustee of the residuary personal estate of the testator, but became absolutely entitled to such residuary estate for his own use and benefit.<sup>1</sup>

The decree and order were appealed against by Eliza Mapp, and were reversed by the Lord Chancellor, who, by an order dated in April, 1849, declared Edward Ellcock to be a trustee for the next of kin, and directed accounts accordingly.<sup>2</sup> This was an appeal against that order.

*Mr. Bethell* and *Mr. Sandys*, for the appellant. — The question here is, whether this gift to Ellcock is a gift on trust generally; for if not, then the decision of the Court below is erroneous. Lord Cottenham thought that it was, and that is the ground of the present appeal. Sir W. Grant and Lord Eldon appear to have taken different views on this subject, in a case which was heard before them.<sup>3</sup> The distinction taken by Sir W. Grant, upon which he maintained the right of the executor to the surplus, \* is, that if I give all my estate to A. B., hereinafter \* 496

<sup>1</sup> 15 Simons, 568.

<sup>2</sup> 2 Phillips, 793.

<sup>3</sup> *Dawson v. Clark*, 15 Ves. 409; 18 Ves. 247.

named, then it is a gift in trust generally; but if I give all my property to A. B. in trust, and declare the trusts, and afterwards appoint him executor, not exhausting the property by those trusts, then the executor takes the surplus. In *Dawson v. Clark*, the testator gave all his estate and effects to two persons, “upon trust, in the first place, to pay, and charged and chargeable with, all his debts and funeral expenses, and the legacies after given.” These persons were afterwards appointed executors; and Sir W. Grant held that, whether they could claim in their individual character or not, they were entitled to the residue, undisposed of, for their own benefit, against the claim of the next of kin, the whole property being personal. That decision is correct in point of principle; and, as the Vice-Chancellor in the present case said,<sup>1</sup> it has never been overruled, for Lord Eldon confirmed the decree, though on a different ground. Former cases had settled the rule, which was then acted upon; and in *Bowker v. Hunter*,<sup>2</sup> Lord Thurlow stated it in very strong terms, saying: <sup>3</sup> “The fundamental distinction is established by laying it down that the rule, that the executor shall take the residue, must prevail, unless there is an irresistible inference to the contrary.” That case was afterwards reheard before the Lords Commissioners, who were Lord Loughborough, and Lords Commissioners Ashhurst and Hotham, and the original decree was confirmed. It is true that, in *Clennell v. Leowthwaite*,<sup>4</sup> it was said that this rule was laid down in language too strong and general; but the rule itself was affirmed. It was there said:<sup>5</sup>

“Though Lord Macclesfield, in *Rutland v. Rutland*,<sup>6</sup> does \* 497 seem to doubt whether, \* before *Foster v. Munt*,<sup>7</sup> an executor, as such, was any thing more than a trustee, it is clear ever since that case, and has been uniformly acquiesced in, whether right or wrong, that making a man an executor does vest in him the whole of the testator’s personal property, who shall be taken to have intended to give it to him beneficially, unless there is a strong and violent presumption to the contrary. I say a strong and violent presumption; for though, in *Bowker v. Hunt*,<sup>8</sup> Lord Thurlow is made to say it must be an ‘irresistible inference,’ that is not the rule; but it must be, as it is stated in many cases, a strong and

<sup>1</sup> 15 Simons, 568.

<sup>2</sup> 1 Brown C. C. 328.

<sup>3</sup> 1 Brown C. C. 330.

<sup>4</sup> 2 Ves. Jun. 465.

<sup>5</sup> 2 Ves. Jun. 465, 471.

<sup>6</sup> 2 P. Wms. 210.

<sup>7</sup> 1 Vernon, 473.

<sup>8</sup> 1 Brown C. C. 328.

violent presumption. Supposing this to be the rule, *Foster v. Munt* has decided that a legacy given to an executor, or, as in that case, equal legacies to two, shall afford that strong and violent presumption to deprive him of the residue. It was supposed that, in that case, there was something of fraud ; but in a note to *Petit v. Smith*<sup>1</sup> it is shown, and must be understood to have been Lord Jeffery's opinion, that they were barred, not on account of fraud, but by having legacies, which was inconsistent with the intention to give the residue to them." No doubt a gift of specific legacies might defeat the general rule, because it would show the particular intention of the testator ; and it was so held in *Holford v. Wood*,<sup>2</sup> where bequests were given in both the will and codicil. But, qualifying even that restriction on the general right of executors, there is the case of *Pratt v. Sladden*,<sup>3</sup> where that right was affirmed. There one of the executors had a legacy given him, and both were called " trustees " in several parts of the will ; but, as they were so called with reference only to specific trusts imposed upon them, distinct from their appointment as executors, it was \* held \* 498 that there was no clear intention to make them trustees as to the residue, to do which required a strong and violent, though not irresistible, presumption.

In considering these various cases, Lord Cottenham, when giving judgment in the present, referred to what he said were the opposing opinions of Sir W. Grant and Lord Eldon, in the case of *Dawson v. Clark*,<sup>4</sup> and then observed :<sup>5</sup> " It therefore becomes necessary to examine the principles and grounds on which those opinions are respectively founded. It must be borne in mind, that the title of an executor to personalty not otherwise disposed of did not arise from any gift of the testator, but from the operation of law incident to the office. The law vested the property in the executor, and if the testator had not directly or indirectly declared any purpose to which he was to apply it, there was nothing to interfere with the legal title of the executor, and he therefore retained such property for his own benefit ; but this result being, as was supposed, generally unforeseen, and not intended by the testator, equity considered many circumstances as indicative of an intention contrary to the claim, and when they were found in the

<sup>1</sup> 1 P. Wms. 8.<sup>4</sup> 15 Ves. 409, and 18 Ves. 247.<sup>2</sup> 4 Ves. 76.<sup>5</sup> 2 Phillips, 796.<sup>3</sup> 14 Ves. 198.



will, declared the executor trustee for the next of kin, and among these was any expression showing that the executor was intended to hold the property upon trust; and where such intention sufficiently appeared, there could not be a more conclusive reason against the claim of the executor, whose title, depending on there being no trust, was necessarily negatived by the testator's declaration that there was to be a trust." In this consideration of principles, some important points are omitted; nor is the reasoning itself accurate. The law vested the property in the executor, not

subject to its being declared in any manner, directly or in-

\*499 directly, that the testator had not applied \*the property to any specific purpose, so as to defeat the executor's title,

but subject only to a clear and unequivocal expression of the testator's intention so to apply it. The executor could not be declared trustee for the next of kin, unless, on the whole context of the will, it was plain that the testator had intended him to take on himself that character. Lord Cottenham relied on the case of *Robinson v. Taylor*; <sup>1</sup> but that case is not at all like the present, for there, after several legacies, the gift was of "all the rest, residue, and remainder of my real and personal estate to my executors upon trust"; and the testator afterwards appointed his executors, "hoping that they will see the same duly performed"; so that in two ways, in the form of the gift and in the injunctions as to the duty to be performed, the testator had in a very marked manner shown his intention to make his executors his trustees; and, as Sir W. Grant, in *Dawson v. Clark*, <sup>2</sup> observed, "it was in the character of executors that they took the property in trust." About that case, therefore, there could be no doubt. It did not at all touch the circumstances in *Dawson v. Clark*; and the decision at which Sir W. Grant there arrived, he adopted and deliberately repeated some years afterwards in *Southouse v. Bate*. <sup>3</sup>

The decision of the Vice-Chancellor in the present case was therefore fully warranted by preceding authorities; for even Lord Eldon, when the case of *Dawson v. Clark* was before him, <sup>4</sup> did not reverse the decision of Sir W. Grant, but merely made some observations upon Sir W. Grant's opinions, and affirmed the decision, though upon another point. The passage which was relied on by Lord Cottenham, as showing that Lord Eldon had

<sup>1</sup> 2 Brown C. C. 589.

<sup>2</sup> 2 Vesey & Beames, 396.

<sup>3</sup> 15 Ves. 416.

<sup>4</sup> 18 Ves. 247.

entirely reversed the decision of \*Sir W. Grant, was this: \* 500  
 “Where the will affects to dispose of both real and personal estate, if the law has been, as it will I think turn out, that, the trust not exhausting the whole real estate, the devisee will not take beneficially, but a trust results to the heir, in the same case it will not be found that the executor can take for his own benefit the surplus of the personal property.”<sup>1</sup> Again,<sup>2</sup> he says: “My great difficulty in this case is not upon the effect of a devise and bequest of real and personal estate to trustees upon trusts, those trusts expressed not exhausting the whole interest”; and he went on to consider the words of that particular will, and then he delayed his judgment, but some days afterwards held that the will gave the executors an absolute property, and affirmed the decree. So far as Lord Eldon removes the fiduciary form from the gift, he confirms, and does not repudiate, the opinion of Sir W. Grant; and he cannot be considered in that instance, as Lord Cottenham thought, to have been opposed to Sir W. Grant’s judgment. In like manner, Lord Cottenham referred to the case of *The Bishop of Cloyne v. Young*<sup>3</sup> as having settled the principle, which was applicable to all cases of executors, and which, therefore, only required to be applied; but there the intention of the testator was partly, though not completely, manifested to dispose of the surplus, and he besides gave a legacy to one of his executors; and the two things taken together were deemed sufficient to show a positive intention, which would, of course, exclude a legal implication. It is to be remarked, that here there is no legacy to the executor, so as to defeat his beneficial interest in the surplus; and so far, therefore, the case of *The Bishop of Cloyne v. Young* is not unfavourable to the appellants.

\* *Mr. John Stuart and Mr. G. L. Russell*, for the re- \* 501  
 spondent. — Throughout this will, the testator has manifested an intention that the executor should take on trust only, and not beneficially. There are two parts of this will, one dealing with the property, the other with the office. The single case in which any part of the property was given to the executor, who was nevertheless held entitled to the surplus, was that of *Dawson v. Clark*. But Sir W. Grant well knew that, though his decision in that case was not overruled, his reasoning and his doctrine

<sup>1</sup> 18 Ves. 255.<sup>2</sup> 18 Ves. 257.<sup>3</sup> 2 Ves. 91.

were questioned and displaced; and in *Southouse v. Bate*<sup>1</sup> he relaxed his former opinion, while Lord Eldon consistently maintained his own. But even admitting that there was no conflict of opinion between these two Judges in the case of *Dawson v. Clark*, still the difference in the words of the two wills is sufficiently great to prevent the decision of Sir W. Grant in that case from being a binding authority in the present. There the property was left to the executor "on trust to pay, and charged and chargeable with" all his debts, &c. So that the gift was absolute, charged only with a specific trust, which, having been performed, the surplus clearly belonged to the executor; and that was the ground of Lord Eldon's confirmation of the decree of the Master of the Rolls. The case of *Robinson v. Taylor*<sup>2</sup> is a strong authority; for there the trusts, on the face of the will, did not extend to personal estate, but the trusts appeared to relate to real estate alone; still, the residue was held not to go to the executor, but to the next of kin. It is clear that this testator's real estate would not go to the executor; and his slaves in Barbadoes were, according to

\* 502 the laws of that island, real estate. In *Woollett v. Harris*,<sup>3</sup> a testatrix bequeathed all her estate and effects to R. H. and G. L., and the survivor of them, his executors, &c. on trust; and, after some specific dispositions, gave to R. H. 50*l.* and to G. L. all her plate, and directed that they should retain their costs, and not be liable, except for wilful loss and for payment of debts, &c.; and she gave the residue to J. S. for life, and if he should leave issue, to descend to them; and she appointed R. H. and G. L. her executors. J. S. survived the testatrix, and died without issue. His personal representatives were held to be entitled. In *Rhodes v. Rudge*,<sup>4</sup> where the property consisted of realty and personalty, the latter was held primarily liable. Vice-Chancellor Hart there explained the case of *Dawson v. Clark*, when before the Master of the Rolls, so as to show that it could not affect a case like the present. He said: "On a careful perusal of *Dawson v. Clark*, the residuary personal estate was held to vest beneficially in trustees, who were afterwards named executors in the will, because the words of the gift were to them, 'upon trust in the first place to pay, and charged and chargeable with all his just debts and funeral expenses'; and that the trust was not general, but was qualified by

<sup>1</sup> 2 Vesey & Beames, 396.

<sup>3</sup> 5 Maddock, 452.

<sup>2</sup> 2 Brown C. C. 589.

<sup>4</sup> 1 Simons, 79-86.

the words, 'charged and chargeable,' so as to extend to the amount of the charges only ; and that no trust was applied to the surplus after the satisfaction of the charges ; and it was clearly Lord Eldon's opinion, that, if the gift had been to the executors *eo nomine*, by the same words, they would equally have been entitled to the surplus." So that, if the decision of Sir W. Grant, in *Dawson v. Clark*, is not to be considered as overruled, but is to be supported, it is as a decision on a will where there was not a general but a specific trust ; and then it does not apply to the present, for here there are no such specific words, and the trust, being a general trust, attaches on \* the whole of the property. \* 503 If, on the other hand, the judgment of Sir W. Grant is to be treated as formed on the ground that the appointment of the executor was made after the declaration of the specific trust, and therefore took the property as executor, without becoming a trustee for the whole fund, then the case is of no authority, having been, so far as that point is concerned, distinctly overruled by Lord Eldon in a very deliberate judgment. No argument can be drawn from the fact that the testator did not exhaust the whole property in the trusts of his will ; for if the trust attaches upon all the property, the surplus of it must be affected with the trust, and the executor's claim to that surplus can never arise.

If there had been real estate in this case, it is clear that the heir at law would have been entitled to take it, after all the charges thereon had been satisfied ; and if so, then, with regard to personalty, the next of kin, who is, as to personal estate, in the situation of the heir at law, is equally entitled, under similar circumstances.

*Mr. Bethell*, in reply. — The great error of the judgment of the Court below is, that it treated this will as a disposition of the whole of the property. The will certainly begins with the words, "all my estate" ; but it goes on to give distinct parts of that estate, and declares how they shall be respectively applied. The application of these parts is the only trust created by the will. It cannot therefore be said that there was a trust of the whole property. Now, when there are specific directions to an executor as to distinct parts of an estate, and these directions do not exhaust the whole, the executor takes the residue. Even the cases cited on the other side prove this. These are not shadowy distinctions,

as Lord Cottenham treats them, any more than the distinction \*504 between a direction to my executors to sell, and a direction to them that they shall sell, can be called shadowy; and, as to such a direction, before the Statute of Henry VIII., executors under a mere direction to sell had not the power to do so. Under the terms of this will, there is an intention shown that, when the specific trusts have been satisfied, the executor shall take the residue.

If there had been real estate in this case, the executor would have taken it when the specific charges upon it had been exhausted, for by this will he was made the universal heir. The legal title to all the property was in him.

August 8.

THE LORD CHANCELLOR. — In this case the question is, whether an executor is entitled beneficially to the undisposed-of residue of personal estate.

The testator, at the commencement of his will, uses these words: "I give all my estate, both real and personal, in this island and elsewhere, to Edward Ellcock, of, &c. Esquire, his executor, administrators, and assigns, to and for the several uses, intents, and purposes following; that is to say," &c. And then, after specifying various objects of his bounty, he concludes by saying: "Lastly, I nominate, constitute, and appoint the aforesaid Edward Ellcock executor of this my last will and testament."

The late Vice-Chancellor of England decided that Edward Ellcock, the executor, was not a trustee of the residuary personal estate of the said testator, but was absolutely entitled to such residuary personal estate for his own benefit. On appeal that decision was overruled by Lord Cottenham, who held that Edward Ellcock did not become entitled to such residuary personal estate for his own benefit, but was a trustee thereof for the next of kin of the said testator, according to the statute for the distribution of the \*505 personal estate of intestates; and it appears to me, that both upon authority and principle, the decision of Lord Cottenham ought to be affirmed.

Much difference of opinion has existed upon the question involved in this case between Judges of the highest eminence, and there are many decisions upon the subject of a residue which is undisposed of; but the only case which closely resembles the

present, and which I think it necessary particularly to notice on that account, is the case of *Dawson v. Clark*.<sup>1</sup> And upon that case Sir William Grant and Lord Eldon entertained very different opinions.

In that case the residue was claimed by the executors on two grounds: first, as expressly devised to them individually, subject only to the payment of debts and legacies; and secondly, if not so devised, then as not being otherwise disposed of, and therefore belonging to them in their character of executors.

Sir William Grant being of opinion that, if the first point should be determined against them, they must succeed on the second ground, did not think it necessary to consider the first ground, but decided that they were entitled on the second ground.<sup>2</sup>

Lord Eldon, however, though he decided that the executors were entitled on the first ground, yet so distinctly repudiated the second ground, as is pointed out by Lord Cottenham in his judgment in the present case,<sup>3</sup> that I regard his observation as equivalent to a decision that in that case the executors were not entitled in their character of executors; and I agree with Lord Cottenham in considering that there was no real distinction between that case and the present as regards the second ground, on which the executors there claimed. "This," as his Lordship remarked, "is clearly a \* gift of the whole property in trust, though \* 506 the trusts declared do not exhaust the whole."<sup>4</sup>

In *Pratt v. Sladden*,<sup>5</sup> Sir William Grant observed, that "some Judges have been disposed to give way to a very slight indication of intention against the executors, and almost to put them upon proof of an intention in their favour. The modern doctrine, however, is, that the executor shall take beneficially, unless there is a strong and violent presumption that he shall not so take; for Lord Thurlow used too strong an expression when he said it must be 'an irresistible inference.'"

Lord Hardwicke, also, in the *Bishop of Cloyne v. Young*,<sup>6</sup> uses the expression "necessary implication or violent presumption," but only in a comparative or qualified way. There, after observing that it was "too loose and general" a way of stating the

<sup>1</sup> 15 Ves. 415, and 18 Ves. 247.

<sup>2</sup> 15 Ves. 415.

<sup>3</sup> 2 Phillips, 793.

<sup>4</sup> 2 Phillips, 800.

<sup>5</sup> 14 Ves. 193, 197.

<sup>6</sup> 2 Ves. Sen. 91, 96.

principle, to say that "wherever it probably appears that the testator intended only to give the office of executor, or legal interest only, of the personal estate, not the beneficial, he should barely take a trust," he added, that "the rule is rather (which may come to the same thing), that where a necessary implication or violent presumption appears, &c. that the testator, by naming him executor, meant only to give the office of executor, and not the beneficial interest or property, he shall be considered a trustee."

While Lord Hardwicke and Sir William Grant were opposing the notion that a mere probability, or "a very slight indication of intention," that the executor was not to take beneficially was sufficient, I am inclined to think that they have used too strong language in requiring the existence of "a necessary implication or a violent presumption." It seems to me that plain \* 507 implication, or a strong presumption, \* would have been terms more consistent with the decisions and with principle.

It is a question of intention; the law, where none is expressed, implying one in favour of the executors. And I think the result of the cases is not inaccurately stated by the late eminent American Judge, Mr. Justice Story, who, in his work on Equity Jurisprudence,<sup>1</sup> observes: "In equity, if it can be collected from any circumstance or expression in the will, that the testator intended his executor to have only the office, and not the beneficial interest, such intention will receive effect, and the executor will be deemed a trustee for those on whom the law would have cast the surplus in case of a complete intestacy." And in Toller's Executors,<sup>2</sup> and in the more recent and extended work, Williams on Executors,<sup>3</sup> the law is stated to the same effect as in the words of Mr. Justice Story.

It is true that the *onus probandi* is on the parties opposing the executor, in cases not within the Statute 1 Wm. IV. c. 40, just as it is now thrown on the executor in cases within that Act. In the former class of cases there must appear to be an intention to exclude the executor from the beneficial interest; in the latter, to confer that interest upon him. But it must not be inferred from this, that the position of an executor in the former class of cases is analogous to an heir at law of real estate, who takes what is undis-

<sup>1</sup> S. 1208.

<sup>2</sup> Page 1266.

<sup>3</sup> Page 352.

posed of. An heir at law is the person whom the law, so far as it is uncontrolled by testamentary disposition, designates as the proper object of succession to the inheritance. And the maxim is, *melior est dispositio legis quam hominis*. But the executor takes the legal interest by virtue of an express appointment to the office of executor, and the beneficial interest attaches to the legal interest in him, unless the will \* affords sufficient evidence of an in- \* 508 tention that he is to take in a fiduciary character; in which case the beneficial interest has a separate and independent existence, and instead of attaching in him, stands apart from his legal interest, and rests in the persons whom the testator has designated as the objects of his bounty, and who might be termed testamentary *cestuis que trust*; or in default of those, then the persons who have a statutory right, grounded on the relationship to the testator, and who may be considered as the statutory *cestuis que trust*.

Lord Eldon, therefore, justly observed, in *Dawson v. Clark*, that "the proposition that the appointment of executor gives him every thing not disposed of, is not correct";<sup>1</sup> and he gave a conclusive proof of this by adding, that "if a testator appoints an executor in trust, but does not express his object, he might have relinquished that object, meaning it to go to his executor; yet the will expressing that he intended a trust at that time, the executor would not take in respect of the interest he had by virtue of his office."

It has, indeed, been remarked by a learned text-writer, Mr. Bythewood, in his edition of Jarman, and I think correctly, that the rule which gave the residuary property to the executor generally contravened the intention. And the fact that this is so, and that therefore the legislature has declared it desirable to alter the rule, would almost seem to show that in doubtful cases the leaning ought to have been rather against than in favour of the executor.

This, however, I conceive is not one of such doubtful cases, and I think there is no necessity here to consider upon how low a degree of evidence of intention in their favour the statutory objects of succession may be admitted. Their title seems to me to be clear, inasmuch as the executor \* is distinctly \* 509 and unequivocally invested with a fiduciary character as to the whole residue, though the trusts do not exhaust the whole.

<sup>1</sup> 18 Ves. 254.



The circumstance that the trusts do not exhaust the whole has been rightly held to be immaterial. Here that circumstance does not affect the fiduciary character with which the executor has been invested. It only makes him a trustee *pro tanto* for statutory, instead of for testamentary, objects.

Upon principle, then, as well as upon the weight of authority, I am of opinion that the executor in this case is merely a trustee, and I move that the order of Lord Cottenham be affirmed.

*Order affirmed.*<sup>1</sup>

\* 510

\* SALMON v. WEBB.

1852. February 19, 20.

JOSEPH SMITH SALMON, *Plaintiff in error*.JOHN WEBB and WILLIAM FRANKLIN, *Defendants in error*.

*Agreement not to sue. Promissory Note. Practice.*

A. made his promissory note payable on demand, with interest, in favour of B. and C., the executors of D. A. was, with several other relatives, to be entitled to certain benefits, under D.'s will, upon the coming of age of the youngest legatee named in the will. By an agreement made between the legatees, the executors were authorised to lend the funds in their hands on personal security, and a part of these funds having been lent to A. (as well as to the other legatees), he gave the executors the note in question. By the agreement it was settled that the notes given to the executors should not be sued on till the youngest legatee had arrived at the age mentioned in the will. The executors did not sign this agreement; but when it had been signed by the other parties, took it into their possession. The executors brought the action while the legatee in question was alive, and before he had attained the specified age. A. pleaded the agreement as an answer to the action, averring that plaintiffs

<sup>1</sup> See 11 Geo. IV. & 1 Wm. IV. c. 40, by which, in cases of the death of testators subsequently to 1st September, 1830, executors are to be deemed trustees of the residue undisposed of, for the persons who would be entitled under the Statute of Distributions, "unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially." This reverses the rule of construction, stated by Sir W. Grant, in *Dawson v. Clark*, and throws on the executor who claims the surplus the onus of proof of an intention in his favour. What is sufficient to express such an intention may still, therefore, be a question on the construction of the will.

accepted and received the note on the terms and conditions of the agreement, and that the youngest legatee was still under age. At the trial the agreement was proved : —

*Held*, that the plea was bad in substance, for that the agreement was collateral, and was not between the same parties as the note.<sup>1</sup>

The Judges were required to answer a question put by the House. One of them differed from the rest. The opinions of the majority were stated by one of their number, and, in the statement, the principle on which the dissentient Judge formed his opinion was set forth to his satisfaction. The House did not require him to state his reasons at length.

THIS was a writ of error on a judgment of the Court of Exchequer Chamber. Webb and Franklin were the executors of Catherine Smith, deceased, and they brought an action against the defendant upon a promissory note, payable on demand, dated 26th August, 1845, and made by him in their favour as executors for a sum of 106*l.* 15*s.* 8*d.*, with \*interest at \*511 the rate of 4*l.* per cent. Salmon pleaded several pleas, of which the fourth alone became material to be considered. That plea alleged “ that contemporaneously with and at the same time as the making of the note in the first count mentioned, to wit, &c. a certain agreement in writing was made between the defendant and other persons, to wit, William Spicer, Elizabeth Spicer, John Salmon, and Edmund Salmon, and the plaintiffs, whereby it was agreed, by and between the said parties to the said agreement, that the said note in the first count mentioned should not become due and payable, nor should the defendant be called upon to pay the same, or any part thereof, until one Edmund Salmon attained the age of twenty-five years, or if he should die before he attained such age, then upon a certain other event happening, that is to say, certain monies and estate becoming divisible under the will of Catherine Smith, in the declaration mentioned, and not before ; and the defendant saith that the said Edmund Salmon is now, and at the time of the commencement of this suit, to wit, &c. was alive, and within and under the age of twenty-five years, to wit, of the age of twenty-three years ; and the defendant saith that the plaintiffs accepted and received the said note at the time of making the same, to wit, &c. upon the terms and conditions of the said agreement, and upon no other terms and conditions whatsoever. Verification.” The plaintiffs, by their replication, traversed the plea, and issue was joined

<sup>1</sup> See post, *Mangles v. Dixon*, at p. 716.

thereon. In a case of *Webb and Another v. Spicer*, exactly the same issues were raised, and that cause was tried at the Surrey Spring Assizes in 1848, before Mr. Justice Coleridge, when the agreement was proved. All the persons named, being the legatees under Catherine Smith's will (except the plaintiffs) signed it, and the plaintiffs took it into their own possession after it was so signed, and it was produced from \* their custody at the trial. The learned Judge directed a verdict for the plaintiffs, but gave the defendant leave to move to enter a verdict for him on the fourth plea. A rule was obtained for that purpose, and in Hilary Term, 1849, this rule was made absolute.<sup>1</sup> On the judgment so entered for the defendant, the plaintiffs brought a writ of error in the Exchequer Chamber, where the judgment was reversed, and judgment was given for the plaintiffs in error, on the ground that the plea was bad in substance.<sup>2</sup> The same course was taken in the cause of *Webb and Another v. Salmon* (the present plaintiff in error); and he, on the judgment of the Court of Exchequer Chamber being given against him, brought a writ of error to this House.

The Judges were summoned, and Baron Parke, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Maule, Mr. Justice Erle, and Mr. Justice Crompton attended.

*Mr. Prentice*, for the plaintiff in error.—The fourth plea discloses a complete answer to the action. The Court below has erred in assuming that certain cases have laid down the rule that a promissory note cannot be affected by any agreement made contemporaneously with it. No such rule is deducible from those cases, for each depended on the particular circumstances existing in it. Thus, in *Adams v. Wordley*,<sup>3</sup> the agreement set up by the defendant in his plea was not alleged to be in writing, and that case was decided on demurrer; but in *Hartley v. Wilkin-*  
 \* 513 *son*,<sup>4</sup> an indorsement on the note, which had \* been made before the note was signed, was allowed to control the operation of the note, and that ruling of Lord Ellenborough at *Nisi Prius* was afterwards supported by the Court. The case of *Woodbridge v. Spooner*,<sup>5</sup> where Lord Tenterden said, "It is con-

<sup>1</sup> 13 Q. B. 886, nom. *Webb v. Salmon*, and *Webb v. Spicer*.

<sup>2</sup> 13 Q. B. 894.

<sup>4</sup> 4 Campb. 127; 4 Maule & Selwyn, 25.

<sup>3</sup> 1 Meeson & Welsby, 374.

<sup>5</sup> 3 Barnewall & Alderson, 233.

trary to the rules of law to admit extrinsic evidence to show that the intention of a party executing a written instrument is different from that apparent on the face of the instrument itself," does not apply to a case like the present; for there the evidence sought to be laid before the jury consisted of the oral declarations of the testatrix, which, of course, could not prevent the enforcement of a note given by her. Those declarations were made either before or after giving the note, while here the agreement was made contemporaneously with it, was reduced into writing, and, though not actually signed by the executors, was adopted by them, was taken possession of by them, and was produced by them at the trial. They therefore proved, by their own acts, that they took the note on the conditions set forth in the agreement; and, under such circumstances, they must be treated as having taken it as a conditional promise to pay, — as a note which was only to become due on the happening of a contingency, which the plea shows had not happened at the time of the action brought.

The true distinction seems to have been taken by Lord Chief Justice Tindal, in the case of *Brown v. Langley*.<sup>1</sup> There the action was on a promissory note, payable two months after date, and the defendant pleaded an oral agreement, not reduced into writing, by which the note was not to be enforced till certain circumstances had happened. The Court held that this oral agreement could not be set up to contradict this express contract, apparent on the face \* of the note, but that a contemporaneous agree- \* 514 ment in writing might be adduced for that purpose. The Lord Chief Justice said: <sup>2</sup> "The general rule certainly is, that a verbal agreement cannot be received to vary or control the absolute contract, apparent on the face of a bill or note; but the same rule does not apply to the case of an agreement in writing between the parties. I find the law thus stated by Gibbs, J., in *Bowerbank v. Monteiro*:<sup>3</sup> 'In *Hoare v. Graham*,<sup>4</sup> the evidence of the undertaking to provide for the bill was rejected merely because it was parol, and could not be received to control written instruments against an innocent indorsee. But a party may, by one writing, change or contradict another; and there is no innocent indorsee here.' " Those observations are, both as to facts and principle, exactly

<sup>1</sup> 5 Scott N. R. 249; 4 Manning & Granger 466.

<sup>2</sup> 5 Scott N. R. 254.

<sup>4</sup> 3 Campb. 57.

<sup>3</sup> 4 Taunton, 844 — 846.

applicable to the present; and the plea in *Brown v. Langley* was not sustained, simply because the agreement set up was merely oral, and was not properly connected with the note declared on.

After the case of *Ford v. Beech*,<sup>1</sup> it may perhaps be impossible to contend that this plea is good on the ground of avoiding circuitry of action, but it is good on the ground that the note was taken, not as an absolute, but only as a contingent, promise to pay. The fact that the note and the agreement are on two separate pieces of paper is immaterial. A bond might be executed without a defeasance attached; but a defeasance might be executed at the same moment on another piece of paper, and that would control the operation of the bond as much as a defeasance written on the same paper. If that is so with respect to a bond, this agreement, which may be likened to a defeasance, cannot be deprived of its effect because it is not written on the note itself. The agreement stated in the declaration and that in the plea are substantially the same. They constitute but one contract.

*Hartley v. Wilkinson*.<sup>2</sup> The declaration states a part of an agreement, the plea supplies the other part, and both must be read together. In *Leeds v. Lancashire*<sup>3</sup> an indorsement was written on the note before it was signed, and Lord Ellenborough held that that made it an agreement as between the original parties, though the indorsement might not affect it in the hands of a third party, a *bond fide* holder. Here the note is sued on by the original parties.

The mere writing of a note does not make it a perfect instrument; there must be a delivery in it. That is the case even with a bill of exchange (*Marston v. Allen*),<sup>4</sup> where it was held, that though there was an indorsement on the bill, there was no valid delivery, and so no complete transfer.

[THE LORD CHANCELLOR. — But *Churchill v. Gardner*<sup>5</sup> shows that it is not necessary to aver that the maker of a bill delivered it; it is sufficient to state that he made it.]

Here the instrument is a note which does require delivery, and the delivery of it in this case was not as a note containing an absolute promise to pay, but merely a note containing a promise to pay after the happening of a certain event.

<sup>1</sup> 11 Q. B. 852.

<sup>2</sup> 4 Campb. 127.

<sup>3</sup> 2 Campb. 205.

<sup>4</sup> 8 Meeson & Welsby, 494.

<sup>5</sup> 7 Term Rep. 596.

*Mr. Serjeant Shee* and *Mr. Willes*, for the defendants in error. — The agreement set forth in the plea is a new, independent, and collateral contract, entirely different from that stated in the declaration. It is not made between the same parties. The agreement is a mere covenant not to sue within a limited time; but that cannot be pleaded in bar, for such a covenant is no bar, unless it is a covenant \*not to sue at all, and if so, then \*516 it amounts to a release, and must be stamped as such.

*Brill v. Crick*<sup>1</sup> shows that an agreement made at the same time with the note, and indorsed on it, cannot affect the plaintiff's right to sue on it as a note. The whole doctrine on this subject was discussed in *Ford v. Beech*,<sup>2</sup> where an agreement of this sort was set up, and the Court of Exchequer Chamber held, after verdict for the defendant, that the plea was not an answer to the action, because, if the right of action was suspended for any period, it was extinguished altogether, which certainly was not the intention of the parties, and therefore the agreement must be construed as merely giving the defendant a right of action, if the plaintiff did not observe the terms of the agreement.

[THE LORD CHANCELLOR. — Is it not more like *Stracy v. The Bank of England*?<sup>3</sup> There the party had a right to demand a transfer of stock; there was an agreement, as here, not to make the demand until after a certain event; and the Court held the agreement to be binding.]

The distinction between that case and the present is, that there it was not decided that the right of action was suspended, but that the right to demand the doing of a certain thing, the non-performance of which would give the right of action, was agreed to be delayed till a particular event had taken place. Here the plaintiffs have a right of action on the note, — they have not to do any given act before that right arises: the right therefore cannot be suspended by this agreement. That brings the case to that of *Deux v. Jefferies*,<sup>4</sup> where to an action of debt on bond, a covenant not to sue before a certain time was pleaded; but the Court said that the instrument set up was only a covenant, and should not enure as a release; it could not be pleaded in \*bar, \*517 but the party was put to his writ of covenant, if sued before

<sup>1</sup> 1 Meeson & Welsby, 232; Tyrwhitt & Granger, 522.

<sup>2</sup> 11 Q. B. 852.

<sup>3</sup> Cro. Eliz. 352.

<sup>4</sup> 6 Bingham, 754.

a certain time. *Turner v. Davies*,<sup>1</sup> *Bowerbank v. Monteiro*,<sup>2</sup> are to the same effect.

[THE LORD CHANCELLOR. — But the question here is, whether these instruments can be read together, and if so, whether they do not constitute an agreement, and not a promissory note.]

They do not constitute one agreement, and could not be so pleaded, because they are not between the same parties. The note and the agreement, therefore, cannot be treated like a defeasance and a bond; for an essential requisite of a defeasance is, that the bond and the defeasance should be between the same parties. (Sheppard's Touchstone).<sup>3</sup>

The plea here, too, is bad, for not alleging that the agreement was part of the same contract as the note. If the two instruments could stand together in law, it would be because they formed but one contract, and then it would be the duty of the Court to see how their contradictory stipulations could be reconciled. It is impossible to reconcile them, for the parties themselves and the interests of those parties are not the same. That fact alone proves that they must be treated as separate instruments, conveying separate rights. On that arise the objections, first, that an absolute promise to pay on the face of a negotiable instrument cannot be controlled by an agreement to suspend the enforcement of that promise; and next, that if such agreement could be valid for such a purpose, it could only be so as between the same parties. Here there is nothing to render this agreement valid for the purpose for which it is set up in this plea. The two instruments entirely differ from each other, and they are not between the same parties.

\* 518 \* THE LORD CHANCELLOR proposed a question for the consideration of the Judges.

The Judges requested to be allowed to retire to consider their answer. This was granted, and on their return,

BARON PARKE. — The question which your Lordships have been pleased to put to her Majesty's Judges is, "Does the plea set forth upon the record present a sufficient bar to the cause of action set forth in the declaration?"

[His Lordship stated the declaration and the fourth plea.]

<sup>1</sup> 2 Wm. Saund. 150, n. 2.

<sup>2</sup> 397 a. ed. of 1826, by Mr. Atherley.

<sup>3</sup> 4 Taunton, 844.

In answer to the question proposed to us, I have to say that all of us who heard the argument, excepting my brother Erle, agree that the plea is bad, for the reasons given in the judgment of the Court of Exchequer Chamber in this case. My brother Erle thinks that, upon the facts stated in the plea, the defendant did not intend to deliver the note so as to make himself liable until the happening of one of the contingencies there specified. The other Judges think that the meaning of the phrase, "contemporaneously with and at the same time," is merely that the agreement alleged in the plea was made at the same time with the promissory note, not that it was part and parcel of the same instrument, and to be treated and construed as if it was written on the same paper. We consider it, therefore, to be a collateral undertaking, perfectly consistent with the existence of a note containing an absolute promise to pay; and such collateral agreement is no answer to the declaration: First, because there does not appear on the face of the plea to be any sufficient consideration for the plaintiff's promise; secondly, because it is an agreement not to sue for a limited time only, — and a covenant not to sue for a limited time is no answer to an action; thirdly, because there are different parties to the agreement than those to \* the promissory note, and therefore, even if it was an \* 519 absolute contract not to sue at all, it would be unavailable as a defence, because it is not between the same parties. If the defendant is wrongly sued on the note, the defendant and others, not the defendant alone, must join in the action against the plaintiff for so suing, and there can be no defence in such a case on the ground of circuity of action, for there would be none. The defence which rests on the ground of circuity of action applies only to causes of action between the same parties.

LORD BROUGHAM. — Allow me to ask whether my honourable and learned friend Mr. Justice Erle is satisfied that this should be received as his opinion, because, if not, the course is for Mr. Justice Erle to begin, and for you to give the opinion of the other Judges.

MR. JUSTICE ERLE. — The force of my opinion is contained in the exceptive part of that which has been read by my brother Parke.

LORD BROUGHAM. — Then you do not desire to make any statement?



MR. JUSTICE ERLE. — I do not desire to dilate upon the principle, the principle itself having been clearly stated.

THE LORD CHANCELLOR. — Your Lordships having heard the opinion of the learned Judges, and the majority of the learned Judges being of opinion that this judgment ought to be affirmed, I may state that that is the conclusion at which I have myself arrived. I however understand the substance of Mr. Justice Erle's opinion to be, that it appears upon the facts set forth in the plea, that the plaintiffs below did not receive the note upon the ground of being able to enforce it according to its terms, that is to say, as being payable on demand, but upon the ground

\* 520 \* of the right to demand being postponed until the happening of the events mentioned and referred to in the agreement.

My Lords, I own it appears to me that this case is not encumbered with any serious difficulty. The declaration sets forth a note payable on demand. The plea sets forth a certain agreement, and alleges that that agreement was to the effect that the note should not be enforced according to its terms. That appears to be the judgment of the Court of Queen's Bench, and it appears to me that the judgment of the Court of Queen's Bench, proceeding as it does only on the proof of the agreement as a matter of fact, and not on the sufficiency of the plea in point of law, may be said to be in accordance with the opinion which the learned Judges have now delivered. It certainly is not in contradiction to that opinion. If the agreement set forth in the plea forms a part of that note, then the note never was made according to the terms set out in the declaration, and the Court of Queen's Bench having that plea before it, having heard all the evidence in support of that plea, has held that the evidence in the cause did sustain the allegation in the declaration, that the note was made as there set forth. The present opinion of the learned Judges is in conformity with that view; but then another question arises; namely, how far the agreement is an answer to an action on the note.

Now, my Lords, the agreement being made with the defendant and others, must of necessity be collateral to the note, which is a note given by the defendant to the plaintiffs alone. Where the parties to one agreement are different from the parties to another, whatever may be the effect of the agreement, according to any

understanding which can fairly be applied to the subject matter, must it not be treated as being collateral? There are two agreements here, if they may so be called,—the note set forth in the declaration and the agreement set forth in the plea. Those two \* agreements, in one sense, are inconsistent with each \* 521 other; but may they stand together, and can you best give effect to the intentions of the parties by construing the one as operating in restraint of the other, or as creating distinct and independent obligations? It appears to me that you will best give effect to the intention of the parties by construing them as independent of each other. The plaintiffs, by that agreement, would subject themselves, should they fail in the performance of it, to such damages as the parties with whom they contracted might jointly sustain. Damages could not be assessed in regard to several respective injuries to the several individuals; it must be one joint assessment of damages sustained by the whole. It was also the intention of the parties that all with whom the plaintiffs contracted should be parties to enforce the agreement so made, the agreement to be enforced according to the ordinary rules of law, which would require all the contracting parties to be before the Court. Will it or not correspond with that intention to allow one to enforce it without the concurrence of the others? Does the mode of enforcing it vary the right? This plea is an attempted enforcement of that agreement by one contracting party without the others. What is the effect of that? Why, it is to give to the defendant a benefit and an advantage in respect of an injury or damage by the plaintiffs; not which is necessarily an injury or damage applying to the whole of the contracting parties, but to one only, and therefore giving a different effect to the agreement than that which by law properly belongs to it. The agreement and the note may well stand together; and, as it appears to me, the intention of the parties to the agreement will be best effected by allowing them to stand together; that is to say, you leave the plaintiffs to enforce the payment of the note; you leave them to enforce the performance of that entire contract to \* which the plaintiffs and the defendant were alone parties, \* 522 and you leave the parties to the agreement to enforce that agreement by commensurate damages, if a breach of the agreement should take place. It seems to me, therefore, that you best adhere to the general rule of law by holding that those parties

only can enforce the agreement, by any mode, who were the parties to it ; and not that one distinguished from the others should have the power so to do, especially when the consequences of that are consequences enuring only to the benefit of one, and not to the benefit of all. It seems to me, therefore, that this opinion, which has been delivered, corresponds with the judgment of the Court of Queen's Bench.

My Lords, the defendant may rely upon the statement in the latter part of the plea, which is a strong fact, and well calculated to arrest attention ; but I own that, on a deliberate consideration of the matter, it does not appear to me essentially to vary it. What is the latter part of the plea ? It is, " That the plaintiffs accepted and received the note upon the terms and conditions of the agreement." That appears to me only equivalent to what would be expressed by " without prejudice to the agreement " ; that is, they recognise the existence of the agreement, — they take the note subject to the agreement. But how subject ? Subject to its being enforced according to law ; that mode to be, by all the parties consenting to the enforcement, and all recovering damages commensurate with the joint injury. I therefore think that the latter part of the plea does nothing more than import that the note was not taken with the view of affecting in any respect the validity of that agreement ; and I think, as I before stated, that your Lordships will best effectuate the intention of the parties by holding that it is not competent to the defendant to set up this plea in bar of the form of action set forth in the declaration, but \* leaving him, together with the persons who joined with him in the making of that contract, to recover such compensation as it was the object of the parties should be recovered when they made the agreement ; namely, the damages sustained by all.

It appears to me, therefore, that the opinion of the majority of the learned Judges is that upon which your Lordships ought to act ; and, with that respect which is due to the learned Judge who differs from them, your Lordships, acting upon those principles which are perfectly well recognised, will affirm this judgment. I think the case of *Wetherell v. Langston*,<sup>1</sup> cited in the argument in the Court of Queen's Bench,<sup>2</sup> as your Lordships may be aware, perfectly recognises the principle, that a contract made with sev-

<sup>1</sup> 1 Exch. Rep. 634.

<sup>2</sup> 13 Q. B. 892.

eral parties cannot be severally treated. I therefore propose to your Lordships that the present judgment should be affirmed.

LORD BROUGHAM. — I entirely agree with my noble and learned friend. I consider, upon the grounds stated in argument in the Court of Exchequer Chamber, from which this record comes, that the opinion of the learned Judges ought to be adhered to. I have the greatest possible respect for the dissentient opinion of my honourable and learned friend Mr. Justice Erle; but, upon the whole, I think we ought to act in accordance with the view which is adopted by the great majority of the learned Judges; and I do not see any necessary discrepancy between them and the judgment of the Court of Queen's Bench.

*Judgment for the defendant in error.*

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\* DE BEAUVOIR v. DE BEAUVOIR.

\* 524

1852. March 9.

SIR JOHN EDMOND DE BEAUVOIR, Bart., *Appellant*.

RICHARD BENYON DE BEAUVOIR, *Respondent*.

*Will. "Right Heirs." Limitation of Real and Personal Estate.  
Power to convert Personal Estate.*

A testator made a will in the following form: "Whereas I am seised in fee simple of divers freehold manors, or reputed manors, messuages, lands, tenements, rents, and hereditaments, situate, &c., and of a leasehold estate in, &c., and also of a copyhold estate, situate, &c., and also of freehold estates in, &c., and of large sums in the funds of England: now I do hereby give and devise, after my just debts and funeral expenses and legacies are paid (which I order to be paid out of my personal estate), all my estates in the funds of England and all my said manors, &c." unto three persons in succession, and their sons successively in tail male, in strict settlement; "and for default of such issue, I give and devise the same to my own right heirs for ever." He then gave his trustees a power, with the consent of the person who might be in possession, to lay out his personal estate in the purchase of freeholds, &c. and to settle the same when purchased to such uses as were declared of his "manors, or reputed manors, messuages, lands, tenements, rents, hereditaments, and premises devised by this my will, as shall be then existing undetermined, or capable of taking effect, &c. to, &c. for no other estate, use, trust, or purpose whatsoever": —

*Held*, first, that the power to trustees to convert personalty into realty did not operate as an absolute conversion; but, secondly, that, on the face of the will, it was the intention of the testator to make the two funds a blended property, and to give them the character of real estate, and to make both properties go together, and to give both to persons expressly designated; and that such intention did not cease with the failure of issue male under the limitations, so as to make the real estate afterwards go in one way, and the personal estate in another.<sup>1</sup>

THIS was an appeal against a decree of Vice-Chancellor Wigram, made in a suit instituted to obtain a declaration of the true construction of the will of the late Reverend Peter Beau-  
 \* 525 voir, of Downham-hall, in the county of \*Essex. The appellant was the personal representative of the testator's sole next of kin, and the respondent the testator's heir at law.

The will, which appeared to have been drawn by the testator without professional assistance, bore date the 27th day of July, 1800. After giving, in the ordinary form, pecuniary legacies to several individuals, the testator gave a sum of 6000*l.* in the 4 per cents. to his godson R. P. Whish, half of the interest of which was to be expended in his maintenance and education, and the other half, with the principal, to be paid over to him when he should arrive at twenty-one; but if the said R. P. Whish should die before twenty-one, then the said 6000*l.* were given to "Martin Whish and Richard Benyon, and their heirs," during the life of Harriet Whish, and for her separate use, with a power of appointment. The will then proceeded thus: "And whereas I am seised in fee simple of divers freehold manors or reputed manors, messuages, lands, tenements, rents, and hereditaments, situate, &c., and of a leasehold estate in, &c., and also of a copyhold estate situate, &c., which I have surrendered to the use of my will: And also of freehold estates in Essex, and of large sums in the funds of England: Now I do hereby give and devise, after my just debts and funeral expenses and legacies are paid, which I order to be paid out of my personal estate, all my estates in the funds of England, and all my said manors or reputed manors, messuages, lands, tenements, tithes, rents, hereditaments, and premises, both freehold, leasehold, and copyhold, and what other kind and nature soever, and wheresoever situate in the kingdom of Great Britain, and whereof I have power to dispose, and all my estate, right, title,

<sup>1</sup> See *Egerton v. Brownlow*, 4 House of Lords Cases, 58.

and interest therein, in possession, reversion, or otherwise howsoever, with their and every of their rights, members, and appurtenances, unto Edward Benyon, second son of the \* late \* 526 Richard Benyon, of Englefield-house, in the county of Berkshire, and his assigns, for and during the term of his natural life, without impeachment of waste ; and from and after the determination of that estate, I give and devise the same to Richard Benyon, of Englefield, in the county of Berkshire, and Martin Whish, of Berners Street, in the county of Middlesex, and their heirs during the life of the said Edward Benyon, in trust to preserve the contingent remainders hereinafter limited from being prevented, defeated, or destroyed, and for that purpose to make entries and bring actions, as occasion shall be or require ; in trust, nevertheless, to permit and suffer the said Edward Benyon and his assigns to receive and take the rents and profits thereof during his life ; and from and after the decease of the said Edward Benyon, I give and devise the same to the first, second, third, fourth, fifth, and every the son and sons of the body of the said Edward Benyon lawfully to be begotten, severally, successively, and respectively, one after another, in order and course as they shall be in priority of birth and seniority of age ; and the several and respective heirs male of the several and respective body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of the body lawfully issuing, to be always preferred and to take before the younger of such sons and the heirs male of his and their body and bodies lawfully issuing." There was a similar gift, with like limitations, to Charles Benyon, the third son of Richard Benyon, of Englefield, and then the will proceeded thus : " And for default of such issue, I give and devise the same to Richard Benyon [the respondent], eldest son of the late Richard Benyon, of Englefield, in the county of Berkshire, and his assigns, for and during the term of his natural life, without impeachment of waste. And from and after the determination of that estate, \* I give and devise the same to the said \* 527 Martin Whish and his heirs, during the life of the said Richard Benyon, in trust, by the ways and means aforesaid to preserve the contingent remainders, but, nevertheless, to permit and suffer the said Richard Benyon and his assigns to receive and take the rents, issues, and profits thereof during his life. And from and after the decease of the said Richard Benyon, I give and de-

visé the same to the first, second, third, fourth, fifth, and all and every other the son and sons of the body of the said Richard Benyon lawfully to be begotten, severally, successively, and respectively, one after another, in order and course as they, and every of them, shall be in priority of birth and seniority of age, and the several and respective heirs male of the body, several and respective body and bodies, of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs male of his body lawfully issuing, to be always preferred and to take before the younger of such sons, and the heirs male of his and their body and bodies lawfully issuing; and for default of such issue, I give and devise the same to my own right heirs for ever." The will then gave certain powers of leasing, and some additional legacies, and appointed the respondent and Martin Whish executors, and concluded in the following words: "And I do give a power to my said trustees, with the consent of the person who may be in possession and entitled to the profits thereof, to lay out and invest the residue and surplus of my said personal estate in the purchase or purchases of freehold messuages, lands, tenements, and hereditaments, within that part of Great Britain called England, and to settle and convey the same, when purchased, to, for, upon, and subject to such and so many of the uses, estates, trusts, powers, provisos, and limitations, hereinbefore limited, created, and declared, of and concerning my said manors or reputed man-

\* 528 ors, messuages, \* lands, tenements, rents, hereditaments, and premises, devised by this my last will, as shall be then existing undetermined, or capable of taking effect, and to and for no other estate, use, trust, or purpose whatsoever."

Edward Benyon and Charles Benyon, the first tenants for life named in the testator's will, departed this life without issue, in his lifetime.

The testator died in September, 1821, leaving the respondent his heir at law, and the last in succession of the devisees under the will, him surviving. The respondent is a widower without issue.

The next of kin of the testator at the time of his death was Mrs. Mary McDougall, who afterwards became the wife of the appellant, then John Edmond Brown, Esq. (subsequently Sir John E. Brown, Bart.), and who has since assumed the name of De Beauvoir, and is her personal representative.

On the 5th March, 1846, the appellant filed his bill in the Court

of Chancery, by which, after stating the facts above set forth, he charged that, according to the true construction of the will, the appellant was entitled under the final limitation in favour of the testator's right heirs in remainder expectant, on the death of the respondent without leaving any son, to all the testator's personal estate and effects which are comprised in and affected by that limitation; but that the respondent alleged that, according to the true construction of the will, the whole of the personal estate would, in the event of his death without leaving any son, belong absolutely to him as heir at law of the testator, that even if the appellant had any interest in any part of the testator's personal estate, he had ceased to have such interest, inasmuch as the whole of such personal estate had, by virtue of the power for that purpose contained in the will, been invested in the purchase of real estates; whereby it had ceased to be personal estate, and became real estate, and \* as such would pass to the testator's \* 529 right heirs in the event of the death of the respondent without leaving issue male; and the bill charged the contrary thereof to be the truth, and alleged that a large part of the personal estate remained uninvested, and that the other part had been invested by the respondent in his character of heir at law or as tenant for life under the will, and not in his character of surviving trustee thereunder, and that such investment would not alter the nature of the property, which would still continue personal estate. The bill prayed a declaration of the trusts of the will in favour of the plaintiff's right as representing the testator's sole next of kin.

The respondent demurred for want of equity, and by an order of the Vice-Chancellor of England, of April 21, 1846, the demurrer was allowed.<sup>1</sup>

The appellant appealed against the order allowing the demurrer.

*Mr. Rolt* and *Mr. Malins* (*Mr. Giffard* was with them) for the appellant. — On the true construction of this will, by the words "my right heirs," the personal estate must descend to those who, according to the ordinary rule of law, will be entitled to personal estate, and the demurrer to this bill cannot be sustained.

The appellant contends, as his first proposition, that after exhausting the issue male of the persons mentioned in the will, it was the intention of the testator that his property should descend

<sup>1</sup> 15 Simons, 163.



as if he had died intestate. That is the effect of what he here directs. The word "heirs" is popularly used as a word of succession, and it is always so employed in the absence of a specific intention to benefit any particular person. It has certainly been

so used by this testator, who was not a professional person.

\* 530 and who \* has shown in other parts of the will that he did not know the distinction between heirs and executors.

The word "heirs" has been used in this popular sense, not by individuals alone, but by the legislature itself. Thus, in the 9 Geo. II. c. 36, one of the Mortmain Acts, the phrase employed is "disherison of lawful heirs," and it is there employed with reference both to real and personal succession. At common law, the word "heirs" has but one strict legal primary signification, and that is, as a word of descent in reference to real estate; but when the context of a will does not allow it to be so applied, then the Courts resort to a secondary signification. To restrict it to its primary signification as a word of descent, even in reference to real estate, there must be a previous descendible estate which the heirs are to take. If a testator devises, or a man by deed gives, an estate "to the heirs of A.," there is nothing preceding it on which to engraft this word as a word of descent, — it must therefore be treated as a word of purchase; but if there had previously been an estate devised or given to A., then the devise or gift to the heirs of A. would have a root to which the word could be applied. There is no such root on which to engraft it here. The will supposes all the previous devises to have failed, and then gives the property to the testator's "own right heirs."

The second proposition therefore follows; that where there is any ingredient of descent in the transmission or devolution of property, whether real or personal, the nature of the property must govern the devolution, unless the contrary intention appears.

Apply these propositions to this will. The word "heirs" is here in the plural number; but that cannot make any difference, though Lord Coke says<sup>1</sup> that there is a distinction between the use of the word in the singular and plural numbers, so that

\* 531 "if a man give land to a man \* and his heir in the singular number, he hath but an estate for life, for his heir cannot take a fee simple by descent, because he is but one; and therefore in that case his heir shall take nothing." Mr. Hargrave, in a

<sup>1</sup> Co. Litt. 8 b.

note to that passage,<sup>1</sup> denies the proposition, and says that heir is *nomen collectivum* in a deed as well as in a will, and operates in both in the same manner, as heirs in the plural number. The true distinction, perhaps, is that an estate tail may be thus created, but not an estate in fee. There is a modern case in which that distinction is expressly taken, *Chambers v. Taylor*,<sup>2</sup> where a settlement was made to the use of the settlor for life, remainder to the use of his wife for life, remainder to the heir female of the settlor, on the body of his wife begotten; and the settlor having had four daughters, it was held that, under the limitation to the "heir female," the daughters took a life estate in the lands, as purchasers. The words "heir" and "heirs" may, therefore, for such a purpose, be regarded as synonymous.

Then what is the meaning of the word "heirs" in this will? It comes after a series of limitations, in which the testator settled the property in strict succession, for the purpose of what was evidently his favourite object, — that of founding a family. When making those limitations, he hoped that they would take effect, and he had no intention to benefit his own right heirs at that time. Richard Benyon was his heir at law, — he was *persona designata*, — he was put the third in the series of limitations, which shows that the testator had an intention distinct from that of benefiting his heir by descent; and then, though the testator knew of daughters existing, he made no limitations as to them, but having kept the property as long as he could in the male line of the Benyons, he did suppose it possible that his great object might fail, and then he made this \*devise to his "own right \*582 heirs." That his will was not made with perfect technical strictness, but was so framed that his favourite object might easily have been defeated, is plain. Thus, there is no provision that the personal estate shall not vest in the first son of Edward Benyon. If Edward had had a son born, and that son had died immediately afterwards, that son would have become entitled to the whole of the property, which, on its death, would have gone from the son to its father, or to its legal representative. Yet that would have defeated the great object of the testator, which was to found a family. He never could have understood such to be the result of using the word "heirs" as he has used it, or he certainly would not have used it in that manner. Another circumstance of im-

<sup>1</sup> Co. Litt. 8 b. n. 4.

<sup>2</sup> 2 Mylne & Craig, 376.

portance in the construction of this will, with a view to show that the testator intended to use the words "my own right heirs" in a popular sense, is, that he employs that word in another part of the will, namely, that relating to the gift of 6000*l.* to Mrs. Whish, with reference to money in the funds. On the question of intention, therefore, there seems no room for doubt that the word "heirs" was used by the testator in the popular, and not in the strict and primary sense applied to it by the common law. It cannot be contended that the word "heirs" is an inflexibly technical word, especially when it is applied, as it is here, to a mixed gift of real and personal estate. This argument for a popular construction of the word does not give a double meaning to it, but simply makes it applicable according to the nature of the property to which it is applied, as if the testator had added, "entitled in due course of succession." In *Wright v. Atkyns*,<sup>1</sup> one question was as to the meaning of a devise to "my family"; and Lord Redesdale, when the case was in this House, \*583 \* said,<sup>2</sup> "'Family' cannot mean heir at law, — that is to defeat the whole will." In this case to give the words "my own right heirs" the meaning of heir at law, would have exactly the same effect.

Considerable stress was laid in the Court below on the power given to the trustees to lay out, with the consent of the tenant for life, the surplus of the personal estate in the purchase of land; but that is of no importance, for the trustees of themselves would have had no power to lay it all out. It was necessary to give them such a power. Suppose that power had been, which it was not, exercised, the conversion of personalty into realty would not have affected the true construction of the will. The conversion would have been a conversion merely for the purposes of the will. The testator intended to benefit a particular individual for the time; but if that special object should fail, he intended to let his successors take the property. If the money had not been invested in the purchase of land, his personal representative, and not his heir, would have been entitled to it. The power was a mere authority to invest, the better to provide for this family, which the testator hoped to create out of that of the Benyons.

<sup>1</sup> "The Law of Real Property, as administered in the House of Lords," p. 376 et seq. 17 Ves. 255; 19 Ves. 299; Cooper Ch. Cas. 111; 1 Turner & Russell, 145.

<sup>2</sup> "The Law of Real Property," &c. 385.

The authorities relied on in the Court below do not warrant this judgment. The first was that of *Forster v. Sierra*.<sup>1</sup> There the gift was "to my right heirs on the part of my mother"; and Lord Loughborough held a sister and a sister's son to be entitled against remoter relations. In that case the descent was broken; there was a devise to trustees, and there was no series of limitations in which the testator pointed out the purpose of his will, and showed how he was desirous of blending real and personal estate together. Besides, there the gift was not as here, to "right heirs" generally, but to right heirs on the part of the testator's \*mother, which was selecting a particular class; \*584 and therefore the law was not allowed to take its ordinary course. In *Gwynne v. Muddock*<sup>2</sup> the gift was of real and personal estate to the daughter-in-law of the testator, and after her death to her "nighest heir, to enjoy the same." Again, there was no series of limitations; the person was pointed out, and it was a mere question of intention as to the personalty and realty both going to one individual; and the word "heir" was in the singular, which is particularly appropriate for a taking by purchase. But for the intention being clear, and the person being pointed out, the case would not have been decided as it was. In *Swaine v. Burton*<sup>3</sup> the devise was to trustees to convey to the heir or heirs at law of her cousin W. C., deceased. The heir of W. C. was also the heir of the testatrix, and there was no ingredient of descent in that case, and the gift was also "to the heirs, executors, and administrators of the heir or heirs at law." The descent was there broken, and the Lord Chancellor said: <sup>4</sup> "The effect of this devise is to break the descent, vesting the estate in trustees, and directing them to convey to the persons described as purchasers. Where the legal descent is, by the devise to trustees, broken, does the direction to convey to persons, not in the character of heirs of the testatrix, but who happen to be so, make them take by descent, as they cannot take in law?" These passages explain the principle on which that judgment proceeded. In *Mounsey v. Blamire*,<sup>5</sup> which is the only case of the gift to the heir of the testator, there was a simple legacy of 400*l.* to "my heir"; and there the heir took as *persona designata*. Sir J. Leach, in giving judgment in that case,

<sup>1</sup> 4 Ves. 766.<sup>4</sup> 15 Ves. 369, 370.<sup>2</sup> 14 Ves. 488.<sup>5</sup> 4 Russell, 384.<sup>3</sup> 15 Ves. 365.

\* 535 referred to *Vaux v. Henderson*,<sup>1</sup> \* where the legacy was "to

A., and failing him by decease before me, to his heirs": and remarked, that "where the word 'heir' is used to denote succession, there it may well be understood to mean such person or persons as would legally succeed to the property, according to its nature and quality." The word "heirs" was treated as a word of substitution, and not of strict limitation. In the same way gavelkind or borough English lands being devised to "the right heirs of J. S.," the heir at law of J. S., and not his gavelkind heirs, and his eldest son, and not his youngest son, would take,<sup>2</sup> because heir is a name of purchase, and because there is no previous taker of the property through whom the land can come to the heir of J. S., qualified with any ingredient of descent. In *Pyot v. Pyot*<sup>3</sup> a devise of real and personal estate, "in trust for the nearest relation of the Pyots," was held to describe a particular stock, and the mixed fund did not go to the heir at law of that name. *Holloway v. Holloway*<sup>4</sup> is a strong authority for the appellant, so far as the reasoning of the Court is concerned, for it shows that the word "heirs" may be used as applying *quoad* succession, both to real and personal property. In *Ware v. Rowland*<sup>5</sup> an annuity of 600*l.* was to be paid to the testator's daughter for her life, and on her death the principal was to be divided amongst her children, if she had any, but if none, then "to and amongst his heirs at law, share and share alike." In a subsequent part of the will, she was appointed by name residuary legatee. She was his sole heiress at law, and next of kin at the time of his death; and it was held that she, and not his heir at law at the time of her death, was entitled to the ultimate gift of the principal

\* 536 sum. In that case, \* Lord Cottenham referred to *Holloway v. Holloway* with approbation, and adopted its doctrine, and acted on it. In *Evans v. Salt*<sup>6</sup> there was a gift to Sarah Evans of the use of a sum of money for life, and at her death to her children; and another gift to the testator's son, and in default of his issue, to the "heirs" of the above-named Sarah Evans. It was held to go, at the death of Sarah Evans, to her next of kin. In *Gittings v. M<sup>r</sup> Dermott*<sup>7</sup> the gift of legacies was "to the children

<sup>1</sup> 1 Jacob & Walker, 388 note.

<sup>2</sup> 2 Phillips, 635.

<sup>3</sup> Vin. Abr. tit. Heir G. 5, pl. 1 & pl. 8.

<sup>4</sup> 6 Beavan, 266.

<sup>5</sup> 1 Ves. Sen. 335.

<sup>7</sup> 2 Mylne & Keene, 69.

<sup>6</sup> 5 Ves. 399.

of my sister, or to their heirs." Some of the children died in the lifetime of the testator. Sir J. Leach held that the legacies to these children did not lapse, but that their next of kin took by substitution at the death of the testator. That decision was affirmed by Lord Chancellor Brougham, who observed;<sup>1</sup> "Here it may be said that no distinct substitution is made, inasmuch as the word 'heirs' is of ambiguous import when applied to a legacy. But there is really nothing in this objection, for the sense in which this word shall be taken when applied to personalty is fixed by many decisions. It designates the heir of the personalty; that is, the next of kin." The principle on which that rule is founded is derived from the nature of the property. *Boydell v. Golightly*<sup>2</sup> will perhaps be cited on the other side; but it does not bear on this question, for it depended altogether on the words of the will, and the person entitled took as being a person designated. The same explanation is applicable to the case of *Danvers v. Earl of Clarendon*,<sup>3</sup> where the word "heir" was a word of description, and designated the person who was to take.

All these cases proceed on one principle, though it led to varying results. When personal property is given to "heirs," the instrument must be looked at, in order to \* 537 ascertain what was the intention of the testator. Unless it is plain that he intended to use the word in its strict legal sense, it must receive a construction according to the subject matter of the gift. Here the testator had a particular object, to the accomplishment of which he devoted, in the first instance, all his property; but he foresaw that that object might fail; and then, feeling that the great purpose he had in view would be defeated, he became indifferent to any special appropriation of his personal estate, and gave his property, in the ordinary way, among his relations. He did not give it to any particular individual, but to his "own right heirs," — a phrase which must be considered to mean such persons as would take this particular kind of property, had he left it without any specific directions whatever. His favourite object having failed, he let the law take its course with respect to this property.

*Mr. Bethell and Mr. Lee (Mr. Erskine was with them) for the*

<sup>1</sup> 2 Mylne & Keene, 76.

<sup>2</sup> 1 Vernon, 35.

<sup>3</sup> 14 Simons, 327.

respondent. — If recourse is had to legal principles, the meaning of the words “right heirs” may be easily discovered. In the case of *Birtwhistle v. Vardill*,<sup>1</sup> in the judgment of this House, these principles are fully investigated and explained. The fallacy of the argument on the other side is this: It is assumed, that because, if the ultimate limitation of a real estate was to right heirs or heirs at law, they would be in by descent, and not by devise; therefore, if real and personal estate are blended together in the same series of limitations, the result would be the same as an intestacy with regard to personal estate; the conclusion being, that because, under this form of limitation, *quoad* the realty, the heir will take by descent, it is no gift at all as to the personalty, but the  
 \* 538 next \* of kin comes in for it under the Statute of Distributions. This assumption is neither justified by authority nor principle. Under a will giving the fee simple to the heir at law, he would take by descent, yet the devise would not be void,—it might be good for some purposes as against him. It is not wholly to be disregarded.

[THE LORD CHANCELLOR. — The devise shows the intention that the heir should take; the law gives effect to that intention by a higher title.]

That is so; and consequently, in the case of personalty devised to the heir at law, it cannot be treated as an intestacy. Yet the argument for the appellant cannot be maintained unless it is so treated.

There are in this will two intentions, which run together, and must govern the construction of it. As to these, it is clear, first, that the real and personal estates accompany each other under the special devises to the Benyons, being blended together, going under the same course of limitations, and being intended to be enjoyed by one and the same person. If so, how is it possible to say that, when you have run down the chain of limitations till you have arrived at the devise to the right heirs, the estate is then to be severed, the intentions of the testator disregarded, the land to be given to the heir at law, and the personalty to be distributed? It cannot be so. Secondly, it is clear that the personalty has been absolutely converted by the directions of the will. The power to convert is not, as contended for by the other side, a simple discretionary power to the trustees; but the will, if all the parts are

<sup>1</sup> 2 Clark & Finnelly, 571; 7 Clark & Finnelly, 895.

taken together, shows that it was imperative on the trustees to convert the personal into real estate; and the direction must be assumed to have been obeyed. The testator expressly says, "I give and devise, after my just debts and funeral expenses and legacies are paid (which I order to be paid \* out of my \* 539 personal estate)," — thereby showing that he intended completely to dispose of his personal estate, — "all my estates in the funds of England, and all my said manors, or reputed manors, both freehold, leasehold, and copyhold, and what other kind and nature soever," to Edward Benyon, who was to be the first of the family which the testator desired to found.

This mode of devise shows that the testator, however he might mistake technical terms, did most positively intend that his "estates in the funds," and his manors and freehold estates, should go together. The order in a subsequent part of the will to sell stock, in order to pay debts, was merely made for the purpose of enabling the executors effectually to do what he assumed to have been done when he made the devise which has just been read. After the debts had been paid, he treated the "estates in the funds" and the "estates in freeholds" as synonymous terms. In the power to sell and invest, no discretion is given to the trustees; they are absolutely to sell, and if they had any discretion, it is merely as to the mode of laying out the money, as to which alone they are to have the consent of the person in possession. The personal estate was in this way given with the real estate, and was, when invested, to be subject to the same rules for enjoyment. Devised in this manner, the personal estate is, whether actually converted or not, to be considered as land. *Lechmere v. Earl of Carlisle*,<sup>1</sup> *Cowley v. Hartstonge*,<sup>2</sup> *Earlom v. Saunders*.<sup>3</sup>

[THE LORD CHANCELLOR. — The case of *Cowley v. Hartstonge* \* was a case of an actual trust, with an election as to \* 540 the mode of performing it.]

In which respect the present case resembles it. The same question was afterwards considered in *Cookson v. Cookson*,<sup>4</sup> where these previous decisions were fully discussed, though that case is rather

<sup>1</sup> 3 P. Wms. 211.

<sup>2</sup> 1 Dow, 361. See *Williamson v. The Advocate-General*, 10 Clark & Finnelly, 1.

<sup>3</sup> Ambler, 241, cited and commented on in *Cowley v. Hartstonge*.

<sup>4</sup> 12 Clark & Finnelly, 121.



valuable for the remarks made upon them than as directly bearing on the present. The case of *Wrightson v. Macaulay*<sup>1</sup> is a distinct authority to show that the mere direction to have the consent of any parties to the conversion would not affect the direction to make it, for which *Lechmere v. Earl of Carlisle* was relied on.

The case of *Holloway v. Holloway*<sup>2</sup> cannot be supported to the extent of declaring that where personal property is given to "heirs," the word, "though it has a definite sense as to real estate, must mean such person as the law points out to succeed to the personal property"; and the learned Judge himself invalidates the authority of this observation by previously saying, "I am very glad that that releases me from the necessity of stating what is meant by the words 'heirs at law.'" Besides, there the personal property, under certain circumstances, was to revert to the personal estate of the testator, and to go on as if it had never been taken from it. That case, therefore, cannot be taken as a guide here. The case of *Evans v. Salt*<sup>3</sup> was not well considered: no argument appears to have taken place. Now these are the only two cases that give any semblance of authority for the proposition contended for by the appellant, whereas the case of *Gwynne v.*

*Muddock*<sup>4</sup> is entirely opposite to that proposition, and is in \*541 its circumstances precisely similar to this case. There \*Sir

W. Grant decided on the intention of the testator; and unless there is any distinction between the "nighest heir at law" and "right heirs," that decision ought to be held to govern the present. *Mounsey v. Blamire*<sup>5</sup> is to the same effect, and yet, if the reasoning on the other side is correct, there was an intestacy in that case to the amount of 4000*l.* But to have held that to be so would have been to defeat the intention of the testator.

The proposition that the word "heir," in a gift of personal property, must mean the heir according to the quality of the property, cannot be supported. A devise, either of gavelkind lands, or of lands in borough English, to heirs, without more, will carry those lands to the heir at law. *Viner's Abridgment*.<sup>6</sup> There is likewise a passage in *Sheppard's Touchstone*,<sup>7</sup> which is a distinct au-

<sup>1</sup> 4 Hare, 487.

<sup>2</sup> 5 Ves. 399.

<sup>3</sup> 6 Beavan, 266.

<sup>4</sup> 14 Ves. 488.

<sup>5</sup> 4 Russell, 384.

<sup>6</sup> Tit. Heir, G. 5, pl. 1, pl. 8.

<sup>7</sup> 446.

thority to show that personal property may be given to the heir, and that the nature of the property will not determine the person who is to take by that description, but that the very heir, the person who fulfils the description given by the words used by the testator, will take, though without such words it would have gone to the next of kin. Thus, in *Mounsey v. Blamire*,<sup>1</sup> where personal property was given, the nature of the property did not determine the person who was to take, nor did it in *Pleydell v. Pleydell*.<sup>2</sup> In the latter case, as in *Danvers v. Earl of Clarendon*,<sup>3</sup> the property was personal, and yet the heir, and not the executor, was decreed to take. Of course the word "heir" may be used, with reference to the succession to property, so as to show that heirs at law are not intended; and where it is so, the property will go to the person who has been clearly intended by the testator, whether he is technically \* heir or not. The decisions in *Vaux v. Hen-* \* 542 *derson*<sup>4</sup> and *Gittings v. M<sup>d</sup> Dermott*<sup>5</sup> may be explained on that principle. But that argument as to the possible use of a particular word does not aid the appellant. *Pyot v. Pyot*<sup>6</sup> was a case of mixed property, and there the intention of the testator was what the Lord Chancellor acted on, the word "relations" receiving a construction which, in the opinion of the Chancellor, best effectuated that intention. *Tetlow v. Ashton*<sup>7</sup> is the most recent case on the subject, and there, on a devise of real and personal estate to the trustees, on trust for a life estate to A., and should he leave lawful issue, to his children, share and share alike, and should he die without lawful issue, to the heir at law of the testator's family then living, whosoever the same might be, Vice-Chancellor Knight Bruce held that the next of kin had no interest whatever in the gift.

The intention of the testator must regulate the application of the fund, if that intention can be ascertained. Here it is plain that the intention was, that the realty and personalty should go together; and that being so, the words "right heirs" must receive their strict legal construction.

*Mr. Rolt*, in reply. — It has been assumed, throughout the argu-

<sup>1</sup> 4 Russell, 384.

<sup>2</sup> 1 P. Wms. 748.

<sup>3</sup> 1 Vernon, 35.

<sup>4</sup> 1 Jacob & Walker, 388 n.

<sup>5</sup> 2 Mylne & Keen, 69.

<sup>6</sup> 1 Ves. Sen. 335.

<sup>7</sup> 20 Law Journal N. S. Chanc. 53.

ment on the other side, that the word "heir" has a fixed meaning, even when applied to personal estate. That is not so; it has a meaning depending on the property to be given, unless otherwise explained. The testator made one mistake in the use of it in this will; and his real intention is shown by his abandonment of an attempt to secure a strict line of heirship, if that of the Benyons should fail. It never was contended that the testator

\* 543 had died intestate with respect \* to any part of his property, but that he had made a gift which, under the circumstances that have arisen, produced the same result as if he had died intestate. *Pleydell v. Pleydell*<sup>1</sup> does not bear on this case, for the question there was, what was the meaning in that will of "dying without issue," and the time to which that phrase applied. If that case could be deemed a decision on this point, then *Gittings v. M<sup>r</sup> Dermott*<sup>2</sup> cannot be reconciled with it. *Tetlow v. Ashton*<sup>3</sup> is a case still under discussion, and cannot therefore be treated as an authority; besides which, the words there are very different. In *Doe d. Thwaites v. Over*,<sup>4</sup> a case before the Master of the Rolls in 1782 is cited, and is thus represented: "Under a limitation to the family of J. S., the real estates descend to the heir at law; the personal estate goes to the next of kin." It is said that "the decree of that day, upon search, has not been found." A recent search has been more successful, and this is the entry, which certainly does not support the representation there made of the case: "CUR.—Let the defendants Rogers and Burgesse come to an account before Mr. Burroughs for the personal estate of Saml. Fitzall come to their or either of their hands, or to the hands of any other person for their or either of their own use; And do declare that one moiety of the clear estate, after payment of the debts and legacies and funeral expenses of Saml. Fitzall, is to be considered as part of the personal estate of Eliz. Fitzall, and that the other moiety doth belong to defendant Richard Fitzall of Bristol in his own right and as executor of his brother Hugh Fitzall, and the defendants Rogers and Burgesse to pay the same over to him accordingly; and as to the real estate of Saml. Fitzall, am opinion (*sic*) that the wife became entitled thereto by

\* 544 \* the express words of the will in fee simple." That case, therefore, does not support the argument for which it was

<sup>1</sup> 1 P. Wms. 748.

<sup>2</sup> 20 Law Journal N. S. Chanc. 53.

<sup>3</sup> 2 Mylne & Keen, 69.

<sup>4</sup> 1 Taunton, 263—266.

there cited ; but it would be an authority to show that, under a general devise of that sort, the real estate may go to one party, and the personal estate to another.

As to the conversion, that was not imposed on the trustees as a duty, nor even as a thing depending on their discretion, but was a mere power given to them, should those in possession desire it. *Cowley v. Hartstonge*<sup>1</sup> is not in point ; for there the person was in possession ; but Edward Benyon was not. Some of the personal property here remains unconverted. But suppose the whole of it had been converted, the conversion could only have been for certain purposes ; and it would remain subject to the contingency of the failure of the persons to whom it was first given for those purposes ; and on such failure would go to the testator's "right heirs," who in such a case must be those to whom the law would give his personal property. The Courts cannot alter nor extend the purposes for which the conversion was ordered to be made.

THE LORD CHANCELLOR. — My Lords, the property at stake in this case is of so large an amount, that if I could entertain any doubt upon the question of law which is now to be decided, I should certainly recommend your Lordships to adjourn the further consideration of the case, in order to give time to consider it. The case has been remarkably well argued at the bar, both upon authority and upon principle ; and the party who fails will have the satisfaction of knowing that nothing has escaped the attention, zeal, and knowledge of the learned counsel at the bar in advocating his interests.

The question before your Lordships must be decided, \* first, upon the intention of the testator as it may be col- \* 545 lected upon the face of the will, without reference to any rule of law ; and then we must apply the rules of law to the intention thus collected, in order to see whether we are at liberty, according to the principles of law, to carry that intention into effect.

With respect to the intention of the testator, taking the whole will together, I think it impossible to entertain any reasonable doubt. It is undoubtedly a singular will. It is written by the testator himself. Not being a lawyer, he confounded the meanings which the law attaches to certain words. He does not dis-

<sup>1</sup> 1 Dow, 361.

pose regularly, and by apt words, of all his property ; and yet, when we refer to the various limitations which he introduces,—limitations requiring the utmost accuracy in point of law, there is not a single fault to be found with the strict correctness of expression applicable to each. I should suppose that he had had a previous will made for him, or had some precedent before him which he copied, but which did not happen exactly to fit his purpose.

There has been much contention at the bar as to the intention or meaning of the testator in certain words which he has used. In the first place, there is a disposition, upon the face of the will, of a certain sum of 4 per cent. stock ; and he gives that, after certain interests, to trustees “and their heirs,” upon certain trusts, during the life of a lady. Now this has been argued in both ways. It is said, that the testator must have known the consequence of law attaching to the use of the word “heirs” ; and that, therefore, when he used it, he meant those who would take personal property, which this was, in succession. But that assumes what I think we have no right to assume with reference to the rest of the will. It is perfectly clear that that limitation to trustees, \* 546 “and their heirs,” would carry the stock in question to their personal and not to their real representatives. That requires no argument. But it is not so clear that the testator did not use those words from his insufficient knowledge of the law. The persons to whom the property passed under this expression would take it equally as trustees or executors. Whoever took it would take it in the same character, and impressed with the same trusts ; and I think the rest of the will shows that this testator supposed that he could dispose of that property to the heirs of the persons named ; and so no doubt he could, if he had used apt words for the purpose. There would have been no difficulty in substituting, as regards the personal estate, the real heirs of the trustees. It only required apt words to effect that purpose. The order of succession would have been broken, and the persons to be trustees after the death of those who were named would be, not their personal, but their real representatives.

There are some words in the devise of all his estates which have not been much adverted to at the bar, but which appear to me to be entitled to some weight. In making a general disposition of that property, which is exceedingly large, he gives “all my estates

in the funds of England, and all my said manors," &c. [His Lordship read the words of the will.<sup>1</sup>] Now the expression, "all my estates in the funds of England," is a singular one. It shows that the testator believed that even in disposing of those funds he was disposing of something which was equivalent to what is technically termed estate; "my estates," not his interest, but his "estates in the funds of England"; and how is that followed up? He disposes of the estates in the funds of England along with all his \* real estates, thus particularly enumerated, — every \* 547 description of property being enumerated, — to the strictest uses, and in the strictest settlement in which any property could possibly be devised by the most accurate and consummate lawyer. No lawyer can deny, after reading the words of this will, that the testator, having large sums in the Funds, treated them as estate, — as real property, to go in succession to the tenants for life, with strict remainder to their issue in tail male successively. Now we know that his disposition would have been disappointed, because the law does not permit such limitations of personal estate. The first person who became the tenant in tail would have taken the property. That was not his intention; that would have been against his intention; but the law would have been too strong for him. But that has no effect upon the operation of the will, when we are asking what his meaning was. His intention, even as respects his funded property, was, that the sons of sons should take in succession as tenants in tail male, one after the other, so as to exhaust the whole male line. Each person was to take the whole property as real estate; and it is perfectly manifest that he did not know the difference. Then, at the close of all, comes that limitation which has been so much observed on, and upon which the case turns. In default of issue of the last person, — issue male, it will be recollected, — he says, "I give and devise the same"; that is, the whole property of both sorts, "to my own right heirs for life."

At the end of this will there is a power which has properly been commented on at your Lordships' bar. It is the power to the trustees, "with the consent of the person who may be in possession and entitled to the profit thereof," to invest the residue and surplus of the personal estate in the purchase of freeholds in England, and to convey the same \* to such uses, &c. \* 548

<sup>1</sup> Ante, p. 525.

as had been declared concerning his manors devised by his will, as should be "then existing, undetermined, or capable of taking effect, and for no other use or purpose whatsoever." Now on the one side it has been contended that this is an absolute power which must be exercised, and that the effect is at once to convert the personal property into real property, to impress that property with a real character, and to dedicate it to those uses to which the real property is dedicated, so that upon that alone the case must be decided; an argument which, if well founded, would put an end to the case of the appellant.

That is a view in which I do not concur. I think no authority has been cited, and I am not aware of any authority which carries a power of this sort to that extent. *Cowley v. Hartstonge*, and the other cases which have been alluded to, certainly do not authorise your Lordships to say that this was an absolute conversion. Take that very case which was before this House. There was, in point of fact, a power, or it may rather be called a trust, to invest the property either in real estate or upon personal security. The trust never was exercised. This House did not say that the trustees could not have exercised, but they never did exercise, the discretion thus reposed in them; and therefore it was held that this House, sitting as a Court of Equity, would exercise the discretion which they had failed to exercise, and that as the whole course of limitation showed that the property was intended to go in the way in which the real estate should go, the discretion must be considered as restricted, and the power must be exercised in directing the property to go according to that destination. So far that case is, no doubt, an important authority bearing upon this question: but I am not prepared to advise your Lordships to decide that the power here is an absolute conversion.

\* 549     \* But then it is said on the other side, that even if that power had been exercised, considering it as a power which it was not absolutely imperative to exercise, the estates which had been purchased with the funded property would still have gone according to the construction of the will contended for by the appellant, namely, to the next of kin. The learned counsel seems, when addressing to your Lordships that argument, to have lost sight for a moment of the words of the power. It is impossible to read this power without seeing that the uses which are referred to are the uses of the real estate, and not the uses of the

funded property, and as the funded property was itself to be exhausted in the very purchases which are supposed to have been made, it was no longer necessary to consider the uses of that property ; but, in the state of things which we are now supposing, namely, that there had been an exercise of the power, the property would be converted into real estate, and the real estate is, by the express direction of this part of the will, to go to the same uses as his "reputed manors, lands, hereditaments," and so on, ending with the word "premises." The word "premises" at the end cannot vary the true construction, if he had already disposed of the whole funded property and converted it into real estate. I am clearly of opinion, therefore, upon that portion of the will, that if the power had been exercised, the property would have become real estate, and would have descended with the rest of the real estate to the heir at law.

Now, your Lordships have heard a very ingenious argument on the part of the appellant, in order to persuade you to stop at the last limitation to the issue male of the tenants for life, and to consider, not, as was imputed to the learned counsel, that there was no disposition on the face of the will, but to consider the actual disposition which is upon the face \* of the will as \* 550 amounting to this: "My property, real and personal, when those several lines have failed for which I have thus particularly provided, shall go in succession according to law, that is, the real portion of it shall descend to the heir at law, and the personal portion shall go to the next of kin." In order to maintain that proposition, it was said that, whenever there is an ingredient of descent, particularly in a case of this sort, it is impossible that the law should not take this course. I am not aware of any authority for that. The question is simply this in every case, is the person described, described as "*persona designata*," or not? Upon the failure of the branches here named, supposing a descent of the real property to take place, it would of course go to the person who was then heir at law. Nobody can dispute that proposition. He would take, no doubt, by his better title, supposing even he had been intended to take under the will ; but it would vest in that person who, at the death of the testator, was his heir at law. It is very true that, by the law of descent, the reversion would travel, as it were, till it was stopped by some act, so as to vest for the time being in the heir of the testator. But that does not



affect the question which we have now to consider. That question is, Who is the person to take? Till you ascertain who that person is, the only remaining question is, Did this testator, or not, mean that the same persons who took the real estate should take the personal estate? It does not matter whether he is described as right heir, or whether he belongs to the class of legal right heirs, if he is the person and the only person who can take, supposing the real and personal property are to go together as a blended fund. The moment you ascertain that the heir at law, at the death of the testator, is the person entitled to the real estate, you ascertain at the same moment, assuming the intention, \* 551 that the same person is to \* take the personal estate as *persona designata*. There is no difficulty, therefore, in applying the rule, if you ascertain the intention.

Now let us look at the intention. The will deals with the whole of the vast funded property, which is called in this case, and with some propriety, if its amount only is considered, his "estates in the Funds." It treats them as a great property, as they are. The testator follows up that immediately by speaking of his "manors, reputed manors," in the usual terms. He then disposes of the property, for life, to certain persons in succession, to their sons, and the issue male of those sons, and so on in succession, providing for the male branch, and only for that branch. Does he make any distinction? Does he entertain any doubt that his estates in the Funds will go precisely in the same way as his real estates? I am not now asking how they will go, but what he intended, as his intention appears upon the face of the will. I can entertain no doubt that his intention was that the personal estate should go, and his belief was that it would go, precisely in the same manner as his real estate itself.

But then you come to the words, "in default of issue"; when all these persons had ceased to live for whom he had provided in this way. He had not exhausted all the branches. He had neither provided for the daughters of sons, nor had he provided for the sons of daughters. There were two of the branches, therefore, of those favoured objects, still to be provided for. If you were to carry out this ultimate limitation, would that tend to any provision for them? In the first place it would enable the heir at law, who was himself one of the objects, to make provision, as far as he thought proper, for the parties for whom the testator himself

had not, by express words, provided. I see a continuing intention in the testator's mind. He describes \* ultimately, \* 552 as a class, his right heirs. His right heir was to be found among the very persons for whom he before had made especial provision about the real estate. The personal estate can only be taken away in order not to carry the two descriptions of property to the same persons. Is there any magic in the words which shall compel your Lordships to say that the same words shall not have the same construction, as applied to the intended object, when no contrary intention is expressed ?

It is said that the effect of this construction will be to give to the two words two senses. It does no such thing. It gives to the right heir two descriptions of property, but in one sense. The fact that the testator's right heir is to take both properties, involves no difference of sense at all. One class of this property he does not take in the character of right heir, but, being the right heir, he takes it as a gift under this will. It is perfectly clear that, if the personal property is given to him expressly, he will take it. The words are not used in two senses, but they are used in one sense, to carry both properties according to the intention. When the law, either by its own force, or in pursuance of the intention of the testator, to be collected from the will, carries the property under those words to the same person, there are not two senses put upon the same words, but the right heir takes both properties ; whereas only one of those properties would necessarily devolve upon him ; both would not, unless the testator had so expressly directed.

In the other view of the case, if you suppose the construction to be, — “ I mean my property, after those limitations, to go in a state of succession,” — there is then a division. It is one declaration, but it involves a division of the property, because the succession would turn out to be, that the real estate would go to the heir, and the personal estate to the personal representatives.

\* Upon the whole will, therefore, I cannot entertain any \* 553 doubt that the intention of the testator, if the law would allow that intention to be carried into effect, was to make this a blended property ; to give to it the character of real estate, and, as regards the disposition of it, whether in the one character or the other, to give it to the same person in reversion, precisely as he had given it to the same persons in possession in the different limitations which he had introduced, and which were not so properly

applicable to it as in the case of this gift of the reversion to the person who filled the character of his right heir.

The power to invest the property, I consider, greatly aids this construction. I do not construe, and I advise your Lordships not to construe, the power to convert as amounting to an absolute conversion. It is not necessary that we should do so ; but still, I consider the power, which is here made subject to the usual check of the consent of the tenant for life, to be a clear indication of the intention of the testator to treat these blended estates in the same manner as he has treated his real estates ; and it leaves no doubt upon my mind as to what was the intention of this testator.

Then the question arises, are we at liberty by law to give effect to that intention ? I am not aware of a single case which militates against such a construction. No such case has been cited. I have diligently attended to every thing which has been quoted at the bar, and I am sure nothing has been omitted that could have been brought forward ; but I know of no case which forbids the construction for which the respondent contends. All that the appellant has been able to do is, to endeavour to qualify the decisions, and to refer them to certain particular grounds ; but there is no authority whatever for his contention. The authorities on \* 554 the other side are numerous ; and though \* they may be cavilled at and partly explained away, yet in all (whether the gift is immediate or in remainder, whether it is of personal estate or of a mixed fund of real and personal estate) the question simply is, whether there is such a description on the face of the will as amounts to a *designatio personæ*, and enables you to give to a person, not filling the character in which he would be entitled to take it by law, the property which the testator has bequeathed to him.

Take those cases which refer to possession. The case which has been so often referred to, *Mounsey v. Blamire*,<sup>1</sup> was a very simple case. The testator gives "to my heir" 4000*l*. That is in possession ; that is immediate. No doubt, if that case had to be argued at the bar of your Lordships' House, we should be told that it could not mean the heir ; it was personal estate, and it must be intended to go to the executors. But there is nothing to prevent your giving to your heir, even by that description, if it sufficiently designates him as the party who is to take it, any sum

<sup>1</sup> 4 Russell, 384.

of money you think fit, or the whole of your personal estate. The Master of the Rolls, who decided that case, referred in a later case<sup>1</sup> to his previous decision, and said that he still adhered to it. What created a little difficulty in that case was, that there were coheirs ; but that was held to make no difference ; coheirs take under that single description of "heir" ; which shows that the word "heir" was not used in that restricted sense in which giving to an heir has been sometimes held to give a property by purchase.

If you refer to the other cases, relating to gifts in remainder, the case in *Sheppard's Touchstone*,<sup>2</sup> which is the first case, is quite decisive. That was a gift of a leasehold estate in remainder to the heir of J. S., after the death of J. S., to whom it was first given. Now, in point of law, there can be no heir to personal estate, which leasehold estate is ; and therefore, though the words would operate to give it to the real representative, still they could not preserve their strict legal meaning. We are sometimes forced to affix a meaning to the word "heir" which does not properly belong to it ; and after the life estate, it was there held that the heir and the executor of the heir should take it.

The case of *Danvers v. Earl of Clarendon*<sup>3</sup> is precisely to the same effect, and was decided on exactly the same principles, which indeed admit of no doubt.

The case of *Holloway v. Holloway*,<sup>4</sup> which is entirely confined to personal estate, is entitled, certainly, to very great attention, in consequence of the high authority of the learned Judge by whom it was decided ; but I cannot help thinking that Lord Alvanley did not give to the words of that will all the weight which they deserved. I think, if they had been fully brought to his view, he would not have entertained the doubt which he expressed. In that case the direction in the will was, that the trustees were to pay 5000*l.* to such child or children as his daughter Hindes should leave at the time of her decease, in such shares and proportions as she should think proper to give the same ; and in case she died leaving no children, then the sum of 1000*l.*, part of the 5000*l.*, in trust for the executors, administrators, or assigns of his daughter Hindes, "and as to the 4000*l.*, residue of the 5000*l.*,

<sup>1</sup> *Gittings v. McDermott*, 2 Mylne & Keen, 69.

<sup>2</sup> 446.

<sup>3</sup> 1 Vernon, 35.

<sup>4</sup> 5 Ves. 399.

in trust for such person or persons as shall be my heir or heirs at law." Now observe the different mode in which the 5000*l.* are disposed of in remainder. One thousand pounds are given in trust for the executors, administrators, and assigns of his daughter, in regular strict words applicable to the property ; the

\* 556 \* other 4000*l.* in trust for such person or persons as should be his own heir or heirs at law. The distinction, therefore, which the testator drew, shows in what senses he used the different words, and I should have thought it could have left no doubt upon the mind of the Court that the 4000*l.* were to go to the heir or heirs at law. Now it is singular, that although Lord Alvanley was glad to escape from deciding that, yet the declaration was of no value in the decision of the case, because the same person happened to fill both relations ; but it is of value as showing what Lord Alvanley's real opinion was ; for the declaration was that the heir at law, not the next of kin, took it. Upon that case, therefore, as far as it goes, I think the observation which was made by Sir John Leach in *Waite v. Templer*<sup>1</sup> is correct : " The Court did not decide that ' heirs ' meant next of kin." That case, therefore, as far as it goes, is consistent with the others.

The case of *Pleydell v. Pleydell*<sup>2</sup> is precisely of the same nature. Sir Joseph Jekyll originally decided that case. When it came before Lord Macclesfield, he did not say a word against the decision itself, but merely observed that the proper time had not arrived to ascertain up to what period the heir at law must be living in order to take. Of course, therefore, that case is an authority the same way.

The only authority I know of for the other view of the question is *Evans v. Salt*.<sup>3</sup> We have all much respect for the noble Lord by whom that case was decided. I will not enter into a discussion upon it. It is a very short case. It came on upon petition. It will not be considered, and I think in fairness to the noble Lord himself, it would not be right to consider it, as a case which is to be put in competition with others upon this important question.

\* 557 \* Then as regards those cases which have been referred to which were decided by the noble Lord now present (Lord Brougham), when he held the Great Seal, no exception can

<sup>1</sup> 2 Simons, 541.

<sup>2</sup> 6 Beavan, 266.

<sup>3</sup> 1 P. Wms. 748.

be taken to them. In *Gittings v. McDermott*<sup>1</sup> there was a gift over to prevent a lapse. The argument was a very fair one, that as the property in one case would have gone to the party absolutely, and from him to his personal representatives, so, when the testator spoke there, by way of substitution, of the heir of the body, it was understood that he meant the same person who would have taken after him in case there had been a lapse.

There was a case of *Waite v. Temple*,<sup>2</sup> in which the gift being to T. P., or to his heirs, executors, administrators, and assigns, and T. P. dying in the testator's lifetime, it was held that the bequest was void for uncertainty. I cannot say that I concur in that view, but it is no authority in favour of the appellant in this case.

As far, therefore, as the authorities go with respect to personal estate, whether the gift be an immediate gift, or whether it be a gift in remainder, the cases appear to me to be uniform, — to give to the words the sense which the testator himself has impressed upon them, — that if he has given to the heir, though the heir would not by law be the person to take that property, he is the person who takes as *persona designata*. It is impossible to lay down any other rule of construction.

Then we come to the mixed cases. I quite agree that as to them the argument is still stronger against the appellant, for if the law is settled when you can collect the intention, as regards personal estate, the argument that it is so must, *à fortiori*, have more operation when you come to blended property, consisting of real and personal estate; for as to so much of the property which consists of real estate there can \*be no doubt or \*558 question, but that the person who is described as "heir" is intended to take in that character. You therefore at once, in speaking of "heir," impress upon the gift, or upon him who is to take it, his own proper character, — that of heir. When you are dealing, therefore, with the same disposition, though of another part of the property, you are relieved from the difficulty which you labour under in the more naked case of personal property, and having found that the testator meant what he has expressed as regards that portion which is real property, you may more readily infer the same intention as regards the other portion of the same gift depending upon the same words, and you therefore allow

<sup>1</sup> 2 Mylne & Keen, 69.

<sup>2</sup> 2 Simons, 524.

the whole disposition the same operation as you would give to it if it had been confined to real estate alone.

The authorities here again are perfectly conclusive as far as they go. There is nothing on the other side. In *Swaine v. Burton*<sup>1</sup> there is a decision of Lord Eldon; but it must be recollected that in that case there was leasehold as well as freehold estate, and Lord Eldon there held that the heirs took as purchasers on account of the manner in which the property was given. He says:<sup>2</sup> "This is not merely a devise of freehold estate, but a disposition of leasehold, freehold, and copyhold lands. There is no doubt that the leasehold estate, in equity, would be taken by them as purchasers." He had no doubt, therefore, that where, by the intention, you find that the heirs were to take as purchasers of the leasehold, the freehold estate would go to them in like manner.

In another case before the same learned Judge, *Wright v. Atkyns*,<sup>3</sup> he says that it is very difficult to give a \*divided construction. Your Lordships will recollect that that was a devise of leaseholds, with freehold of inheritance "to my family." Sir William Grant decided that "family" there meant the head of the family; and therefore the heir ultimately took the property as being the head of the family. That decision was not sustained in this House, though it was not absolutely reversed. But declarations were made in that case, which have always been taken notice of whenever it has been discussed, giving to the person who was made tenant in fee in the first instance all the rights of property during her life, whatever might be the destination of the property after her death. Lord Eldon says: "I must know that fact, in order to determine what, if the subject is real estate only, designates the heir at the death of the deviser, or such person as shall be heir at the death of the first taker, and what is to be the construction if it is a mixed fund, in the absence of all decision, except that the same words are to be construed differently with reference to the different estates, an intention which it is extremely difficult to attribute to the testator." In that case, therefore, which was a simple devise of all the property "to my

<sup>1</sup> 15 Ves. 365.

<sup>2</sup> 15 Ves. 371.

<sup>3</sup> 17 Ves. 255, 19 Ves. 299, Cooper, Ch. Cas. 111, Turner & Russell, 143. See also "The Law of Real Property as administered in the House of Lords," 376 et seq.

family," Lord Eldon thought it was very difficult to collect a different intention, and to attribute to the testator an intent to give the real estate one way and the personal estate another.

The case of *Forster v. Sierra*<sup>1</sup> has some bearing upon the question; but the gift there was to the heirs on the part of the mother; that could not be, properly speaking, a gift to the testator's heirs. Paternal heirs would be excluded, although heirs on the part of the mother had failed; but that only shows that the words are sufficient, which nobody can doubt, to show the sense in which you are to apply them.

This brings us to the case of *Gwynne v. Muddock*,<sup>2</sup> which has been very often mentioned. The testator gave \* to his \* 560 daughter all his real and personal estate, goods, cattle, and so on, "but not to diminish, nor commit no waste on the lands; and my highest heir at law to enjoy the same after her death." No doubt it was the "highest heir at law"; but still the person so designated was to enjoy the property after the death of the daughter. It was rather surprising to find both sides of the bar making use of the judgment of the Master of the Rolls. The judgment in *Gwynne v. Muddock* is very decisive as regards this question. His Honour says: "I have not found any case directly applicable, but there is no doubt the heir at law, properly and technically speaking, may take personal property bequeathed to him by that description. It is always a question of intention what the testator means by the use of such description. Where two descriptions of property are given together in one mass, then the difficulty arises who is meant; for both the next of kin and the heir cannot take, unless this construction can be made, *reddendo singula singulis*, that the next of kin shall take the personal estate, and the heir at law the real estate. But in this case the testator could not mean that, for he blends all the real and personal estate together; and after the death of Ann Williams, directs that his highest heir at law shall enjoy the same. As both are to be enjoyed together, it is absolutely necessary for the Court to say who shall enjoy both. It would be contrary to the intention to divide them; and it would be contrary to the words to give the whole to the next of kin." Now that judgment depends upon this: the intention of the testator was to make a common fund, and not to divide the fund into two parts, those divided parts going to dif-

<sup>1</sup> 4 Ves. 766.<sup>2</sup> 14 Ves. 488.



ferent persons. I think it is the same here. I have already submitted to your Lordships that the true construction of this will is, that the property should all go together, and I see nothing whatever upon the face of it to authorise your Lordships to  
 \*561 \*say that that intention ceases with the termination of issue male, and that then the property is to go, the real estate in one way and the personal estate in another.

I confess I should almost have expected that the case of *Boydell v. Golightly*<sup>1</sup> would have been impeached in point of law. That would have been a very fair line of argument, because it was decided by the same Judge who decided this case, and upon the same principles; and because the intention of this appeal was to bring before the House the question of law as affecting both that case and the present. But that was not done. It is said that it is altogether a different case from this. It appears to me that no two cases, upon principle, can be more alike. *Boydell v. Golightly*, in some respects, is not so strong a case as this. The testator there gives real estate to certain uses, in strict settlement to right heirs, and so on. He then gives personal estate to the same uses. But it is said in the argument, not denying the authority of the case, that already, by the force of the limitations, he has shown that he means his right heir to take that property, and that he will take that property; and that the intention being so, you must construe the gift of the personal estate as a gift to exactly the same person. But can there be such a distinction as this,—that if that which is to be done, taking the two classes separately, will have the operation which is contended for and admitted there, it will not have that effect where the two properties are blended together, as in this case? My opinion is, that the argument for the division is stronger in the case of *Boydell v. Golightly*, where they are separate gifts, than it is in this case, where there is but one, and a blended gift.

The operation, therefore, of this gift of the two properties to the same persons is to vest this property, according to the de-  
 \*562 cision of the Court below, in the person who \*filled the character of heir at the death of the testator. I should therefore propose to your Lordships, if my noble and learned friend, whose assistance the House has had on this occasion, should concur with me, that this decision should be affirmed.

<sup>1</sup> 14 Simons, 327.

**LORD BROUGHAM.** — My Lords, I entirely agree with my noble and learned friend, that there is no reasonable doubt to be entertained upon the construction of this will. If we had had a doubt, we should unquestionably have taken time to look into the case more fully, for the purpose of removing any such doubt; and we should also, in all probability, have had recourse to the practice which, for upwards of twenty years past, has been pursued in your Lordships' House, of giving our judgments in writing. But as there is no reasonable doubt upon the present occasion, I agree with my noble and learned friend, that we shall do well to proceed at once to affirm the judgment of the Court below.

My Lords, the only part of the case upon which I had any doubt was the second part; namely, that with respect to the conversion. But if I agree with the Vice-Chancellor upon that point, it must only strengthen my opinion in favour of the construction which carries the estate to the same persons in respect of personalty and in respect of realty, and which makes that which was in the contemplation of the testator more clear to support such a construction. I consider that, if we were to agree with the Vice-Chancellor entirely upon that point, it would only be an additional argument in favour of the affirmance of his decision; but if we differ from him in that respect, I think there is quite sufficient in the other parts of this case to justify us, and to call upon us to affirm the judgment below.

\* My Lords, the part of the case upon which I think I \*563 differ most from the Court below, is the observation which is made on the meaning of the word "premises." His Honour says: "These are the words by which he has described his freehold estates in that part of his will where he devises them, and to those words he adds the word 'premises.' Now what are 'premises'? Why, some of them are leasehold estate, some of them copyhold estate, and some of them personal estate." And then he goes on to argue upon it. If your Lordships will only look at the will, it is perfectly impossible that the word "premises" can be used as referring to any thing except the real estate, and that which savours of realty, — leasehold estates. In the part of the will in which he says, "all my estates in the Funds of England," — there he stops, — "and all my said manors, or reputed manors, messuages, lands, tenements, tithes, rents, hereditaments, and premises, both freehold, leasehold, and copyhold, and whatever

kind and nature soever, and wheresoever situate." He pauses at the end of "all my estates in the Funds of England." That applies to his personalty. He means upon this part of the will that "premises" should only refer to the last antecedent; namely, the realty. But what makes that clear is the power to demise the property: "Provided always, and it shall and may be lawful to and for the several persons, when and as they shall respectively become tenants in possession of the said manors, messuages, lands, tenements, tithes, rents, hereditaments, and premises, to them respectively limited as aforesaid, by indenture or indentures, under their respective hands and seals, to demise," &c. And then he afterwards uses the words, "possession of the said premises situated in Shoreditch, in the county of Middlesex"; and so on.

It is perfectly clear that he uses the word "premises" here \* 564 in a restricted sense, and not in a \* sense to cover all the preceding words, which would include personalty, his estate in the Funds as well as his real property. Therefore, upon this ground, as well as upon others, with which I need not trouble your Lordships, I entertain some doubt upon the part of his Honour's judgment which refers to the power of conversion. But independently of that doubt, which only strengthens the argument for the respondent, even supposing we differ from his Honour with respect to the power of conversion, there appears to be quite enough to justify the decision which was come to by the Court below.

THE LORD CHANCELLOR.—This is not a case in which the House is inclined to give costs. The appeal will be dismissed without costs.

*Order appealed against affirmed, without costs.*

## \* BIRCH v. JOY.

\* 565

1851. June 2. 1852. March 18, 19.

WYRLEY BIRCH, *Appellant*.GEORGE JOY and others, *Respondents*.

*Vendor and Purchaser. Rents. Interest on Purchase Money.  
Practice. Appeal. Costs.*

It is a general rule of equity, that if a purchaser is in possession of an estate, receiving the rents, he is liable to pay the purchase money, and that the purchase money being retained by him will carry interest to be paid by him to the seller. An agreement, which appears to prevent the application of this rule, will be examined in a Court of Equity, by its aid, and will or will not be enforced, according to circumstances.

B., in March, 1812, contracted for the purchase of an estate from C., for 90,000*l*. The estate was very much encumbered, and C. was to make a title free from all encumbrances, except one mortgage of 12,000*l*. B., on being put into possession of part of the estates, was to pay 16,000*l*. on the 24th of June, 1812, "and a further sum of 4000*l*. at Michaelmas next, on C. putting B. into the actual possession of the remainder, free from all encumbrances, except the mortgage for 12,000*l*.; the further sum of 25,000*l*. in March, 1813; 16,500*l*. in March, 1816; and 16,500*l*. in March, 1818." B. was to grant C. a mortgage of all the estates for securing these three sums at the respective times aforesaid, "with legal interest from Michaelmas next." The 20,000*l*. thus agreed to be paid in two sums within the first year not having been paid by B., nor any of the encumbrances cleared off by C., a new agreement was entered into in October, 1812. B. was forthwith to advance 10,000*l*. to pay off certain encumbrances, he was to be let into immediate possession, to be entitled to the rents and profits "from Michaelmas last," and to be at liberty to cut timber, &c. The conveyances were to be executed as soon as existing difficulties could be removed, and every possible exertion was to be made to that end. It was further agreed, that "the interest of the remainder of the purchase money shall not commence till Lady Day next, in case the title shall be perfected, and the conveyances and other assurances executed at that time, and if not, then to commence on the execution of such assurances." B. \* was let 566 \* into possession, but the business was not completed. In a suit by B. for specific performance, an account was directed; and,

*Held*, first, that under the clause in the second agreement, exempting "the remainder of the purchase money" from the payment of interest, the sum remaining unpaid of the 20,000*l*., and the three sums constituting the 58,000*l*., must be taken to come under that description; secondly, that the exemption of a purchaser in possession of the estate from liability to interest on the purchase money, though permissible if the agreement had been speedily executed,

would not be enforced by any Court of Equity where that state of things continued for many years; and thirdly, that the second contract must be taken to have failed by circumstances, and that the first contract must be decreed to be executed so far as it had remained unexecuted; and the House ordered the accounts to be settled on these principles. No costs were given.

J. was an annuitant on an estate which had been sold to B., subject to the annuity and other encumbrances. J. had also a charge on the purchase money. B. gave notice to put an end to the annuity, and then filed a bill to have it declared that it was at an end, and to have an account taken. The Vice-Chancellor directed the Master to inquire what were the encumbrances, and declared the annuity at an end. The Lord Chancellor affirmed this decree. J. appealed against the last part of it to this House, and the decree was reversed; but the cause went on to further litigation on the other point, and a subsequent decree was made. In this decree, which was made on the hearing upon further directions, the Lord Chancellor introduced alterations and additions to the first decree, as to that part of it which had not been the subject of appeal.

*Held*, that he was at liberty to do so; for that the part unappealed against remainder as before, and was not rendered final by the decision in this House on the part which was the subject of the appeal.

The House, in disposing of a case where there were to be calculations of payments on one side and of interest on the other, laid down certain principles, and desired the parties on both sides to furnish an agreed statement of facts as to the sums to which these principles were to be applied. The House required this statement of sums to be delivered in before the Minutes of the  
\* 567 Order of the House were \* given to the parties, and refused to hear counsel on the subject of this statement and of the Minutes.

An application to advance an appeal for hearing must be made to the Appeal Committee, and not to the House.

WILLIAM COLHOUN, of Wretham, in the county of Norfolk, deceased,<sup>1</sup> was the owner of certain estates known as the Wretham estates, partly freehold and partly held under renewable leases from King's College, Cambridge, and Eton College. The manor of Thorpe Hall, which was part of the estates, was subject to a mortgage, dated October, 1791, then vested in Josiah Holford, for securing 12,000*l.* and interest.

In March and May, 1800, Colhoun, in consideration of two sums of 2000*l.* each, created two annuities, of 300*l.* each, in favour of George Joy, subject to a clause for repurchase on giving

<sup>1</sup> In the course of the very long litigation which arose in this case, many of the parties interested died, and many bills of revivor and supplement were filed. It has not been thought necessary to make more than this general allusion to them, but, for the sake of simplicity, to treat the suit as if it had continued between the original parties.

notice as stated in the annuity deeds. The annuities were charged on Thorpe Hall, subject to the mortgage to Holford, and judgments were entered up in the Court of Queen's Bench for securing them.

Colhoun subsequently created, in May, 1800, certain redeemable annuities, which came to be vested in a person named Wynch, and in July, 1810, others, which came to be vested in Sir James Pulteney.

On the 22d February, 1812, Colhoun entered into an agreement with Wyrley Birch for the sale to him of all the said estates and premises.

\* By this agreement the purchase money was fixed at \*568 95,000*l.*, "to be paid as hereinafter mentioned"; and the estates were to be conveyed free from all encumbrances, subject to a like exception. Colhoun undertook to renew, at his own expense, the college leases, or to allow the expense of such renewals to be deducted out of that part of the purchase money which was to be paid at Michaelmas, 1812. Abstracts of title were to be delivered on the 10th of April, 1812. Birch agreed to pay the 95,000*l.* in the following manner: "If Colhoun shall convey the mansion-house, the hall-farm, and part of the college lands in West Wretham, and all the other farms and lands in mortgage to Sir James Pulteney, and also assign the college lands in East Wretham to Birch (charged nevertheless with 5000*l.* to Messrs. Wynch, payable in three years from Christmas now last past); and if the title to the said estate shall be approved of by Birch, then Birch, on being put into the possession of the said estates in mortgage to Pulteney and Messrs. Wynch and others (subject nevertheless, as to the latter, to the mortgage of 5000*l.*), shall and will pay the sum of 16,000*l.* on the 24th day of June next, and a further sum of 4000*l.* at Michaelmas next, on Colhoun putting Birch into the actual possession of the remainder of the said estates, and conveying, &c. the same to him, his heirs, &c., free from all encumbrances (except a mortgage for 12,000*l.* to Holford, secured upon Thorpe Farm and manor); the further sum of 25,000*l.* on the 25th day of March, 1813; the further sum of 16,500*l.* on the 25th March, 1816; and the further sum of 16,500*l.* on the 25th day of March, 1818; which respective sums, together with the encumbrances of 12,000*l.* and 5000*l.*, make together the purchase money of 95,000*l.* And Birch agrees to

grant a mortgage to Colhoun of all the said estates (subject \*569 to the mortgages of 12,000*l.* and 5000*l.*), \* for securing the three last-mentioned sums of 25,000*l.*, 16,500*l.*, and 16,500*l.*, at the respective times aforesaid, with legal interest from Michaelmas next." Unless Colhoun should procure an undertaking in writing from Holford not to call for his mortgage money prior to Lady Day, 1816, Birch was to be at liberty to discharge the same out of the instalment of 25,000*l.* payable at Lady Day, 1813: "And it is also mutually agreed, that on Birch paying the sum of 16,000*l.* on the 24th day of June next, he shall be let into the actual occupation of the mansion-house, buildings, and appurtenances thereto belonging; and that Colhoun shall continue to occupy that part of the estate which is now in his occupation, and take the profits thereof up to Michaelmas Day following; and that up to Michaelmas next all taxes and other outgoings shall be paid by Colhoun, who shall also allow unto Birch legal interest on the sum of 16,000*l.* up to that time."

Under a special proviso contained in the agreement, certain deductions were afterwards made in the amount of the purchase money, which was reduced to 90,528*l.* 10*s.* 8*d.*

An abstract of title was, in April, 1812, delivered to Birch. Objections on account of encumbrances alleged not to have been communicated to Birch, were taken to it.

The sums of 16,000*l.* and 4000*l.* not having been paid in June, and at Michaelmas, 1812, a further agreement was come to, dated 24th October, 1812, the material parts of which were the following: "In order to facilitate the completion of the purchase of the Wretham estates, and in part performance thereof, it is agreed that Birch shall forthwith advance a sufficient sum to pay the fines for the renewal of the East and West Wretham leases, and shall purchase Wynch's annuities, amounting together to about 10,000*l.* These leases and Wynch's annuities shall be assigned to Birch, or the West Wretham lease shall be

\*570 \*granted to Sir J. Murray (Pulteney's representative), under such arrangements for the security of the money advanced by Birch for the renewal of this lease as shall be agreed upon; Birch shall be put into the immediate actual possession of Wretham Hall, and all the lands, farms, and cottages, and every species of property in East and West Wretham, including the

Thorpe Hall estate, and shall be entitled to the rents and profits of such of the estates as are now tenanted from Michaelmas last, and be at liberty to cut down timber, and do any other act on the estate he may consider conducive to the improvement thereof. The conveyances and other assurances shall be prepared and executed as soon as the different existing difficulties in the title are satisfactorily removed, and every possible exertion shall be made to that end. The interest of the remainder of the purchase money shall not commence till Lady Day next, in case the title shall be perfected and the conveyances and other assurances of the different estates are executed by that time, and if not, then the interest to commence upon the execution of such assurances; and in consideration thereof, any claim on account of dilapidations shall be waived by Birch, except as hereinafter mentioned; under these arrangements Birch shall not be liable to Colhoun or any other person for any rent; and in case he is called upon to pay Holford's and Murray's interest, and Joy's annuity, or any other charges affecting the estates, the East Wretham lease shall be a security in his hands to cover such advances, as well as the fines, &c. paid by him to renew both leases and the repurchase of Wynch's, and other (specified) annuities. In the event of it being found impracticable to make out a satisfactory title to Birch, and the purchase not being completed, Birch shall account with Colhoun for all timber which he may have felled, and Colhoun shall make an allowance to \* Birch for all improve- \* 571 ments he may have made upon the estates." There was also a stipulation that if certain tenants therein mentioned should be liable for dilapidations, they should pay the damages to Birch, and he was to pay them for seeds, turnips, &c. And it was provided that, "when the title is made out, and the requisite assurances and conveyances are ready for execution, and it shall not be convenient to Birch to advance a sufficient sum to discharge Murray's mortgage, in such case Birch shall account with Colhoun for the interest of such mortgage money from such period up to Lady Day next; and it being uncertain whether it will be in the power of Colhoun to give up the actual possession of some parts of the estates to Birch, in such case Colhoun shall allow Birch what shall appear to be the difference between the present rents and the *bond fide* improved rents; and it is agreed that nothing in the above arrangements shall be construed to alter any part of the original



contract for the sale of the Wretham estates, except as herein varied."

Immediately after the last-mentioned agreement, Birch took possession of parts of the estates and premises, and shortly afterwards, in the year 1812, took possession of all the remainder, and had ever since been in possession and in receipt of the rents and profits in all respects as the owner thereof.

On the 16th of April, 1823, Birch caused a notice in writing to be left at the house of Joy, purporting to be a notice under the provisions of the annuity deeds for the purpose of repurchasing the annuities granted to Joy.

The annuities were in arrear, and Colhoun was also indebted to Joy in other monies, to the amount of 8071*l.* 8*s.* 11*d.*; and in order to secure the payment of that sum and interest, Colhoun.

by indenture dated 6th April, 1824, covenanted and agreed \*572 with Joy that the \*balance of the purchase money and interest to arise by sale of the property so contracted to be purchased by Birch, after payment thereof of the incumbrances then legally affecting the same and secured thereon, and also that the premises themselves should, till the sale thereof should be completed, severally thenceforth be charged with and remain as a security to Joy for the sum of 8071*l.* 8*s.* 11*d.* and interest at 5*l.* per cent. per annum. And by the indenture he assigned to Joy all the balance of the purchase money of 95,000*l.* and interest, to hold the same upon trust for payment of the debt of 8071*l.* 8*s.* 11*d.* and interest.

Joy had thus two claims: the one, a charge on the estates under his annuity deeds; and the other, a charge under the last-mentioned deed, on the purchase money and interest to be paid under the agreements.

On the 25th of October, 1825, Birch filed a bill against Colhoun, and against Joy and other parties having charges on the estates, in which he set forth the agreements of February and October, 1812; that he had been put into possession under the latter agreement; that out of the purchase money he had paid off various charges and encumbrances to a considerable amount; that he had paid Joy considerable sums in respect of the annuities; that notices had been given to repurchase the same, on the 5th of May, 1824; that no conveyance of the annuities had been executed by Joy, nor of the estates by Colhoun, and that there were

other charges on the estates to a considerable amount. And the bill prayed for specific performance by Colhoun, alleging that Birch was willing specifically to perform the agreements on his part, and to pay the residue, if any, of the purchase money, after paying thereout such encumbrances affecting the estates as Birch was authorised to pay; and for enabling him so to do, that the priorities of these encumbrances \* might be ascertained, \* 573 and that it might be declared that the two annuities had ceased on the 5th of May, 1824; and that an account might be taken of the arrears prior to that day, and of the costs, and that on the payment of two sums of 2000*l.* each to Joy, the annuities might be reconveyed.

The defendants severally put in answers to this bill, and the cause was heard in February, 1830, before the Vice-Chancellor, who made a decree, by which it was declared that the agreements of February and October, 1812, ought to be specifically performed, and that the annuities had ceased on the 5th of May, 1824; and on payment of the two sums of 2000*l.* each, and arrears, a reconveyance was ordered; and it was referred to the Master to take an account of what remained due to Joy up to that date, and to inquire what were the encumbrances affecting the estates comprised in the said agreements respectively, at the date of the agreements; and to state their respective priorities, and what sums of money had at any time since the date of the agreements been paid by Birch in respect of such encumbrances, out of the purchase moneys of the said estates, and what was due for principal and interest upon such encumbrances respectively. And the Master was further ordered to inquire what remained due from Birch in respect of the purchase money of the estates comprised in the agreements. Joy appealed to the Lord Chancellor as to those parts of the decree which related to the annuities; and on the 10th of August, 1831, the decree of the Vice-Chancellor was affirmed, with costs. Joy then appealed to this House, and on the 10th of March, 1836, an order was made, reversing the decree of the Court below in respect of the annuities, and directing that so much of Birch's bill as related to the same should be dismissed with costs; and it was referred to the Master to inquire whether Joy had any and \* what claim to or lien upon any \* 574 part of the purchase money to be paid by Birch to Colhoun.

And it was further ordered that, after the Master's report, the

Court of Chancery should further proceed in the said cause as should be just.<sup>1</sup>

In January, 1837, Joy and others filed a bill against Birch, which was afterwards dismissed, and which it does not become material to consider.

The Master proceeded in the cause of *Birch v. Joy* to take the accounts directed by the decree in that suit, and on the 3d of April, 1841, made his report, and found that there was the sum of 52,521*l.* 12*s.* 6*d.* due from Birch for principal and interest on the money, and also that there was due to Joy on the security of the assignment of the 6th of April, 1824, for principal and interest up to 28th of January, 1841, the sum of 14,855*l.* 11*s.* 6*d.*, and that Joy had a claim to or lien upon the balance of the purchase money to that amount.

Birch excepted to the Master's report for allowing any interest from the 25th of March, 1813, and for declaring the balance due to be 52,521*l.* 12*s.* 6*d.* Joy also took exceptions to the report.

The exceptions came on for argument before the Vice-Chancellor, and thereupon his Honour made an order, dated 14th of March, 1843, by which it was stated, that it appearing to the Court that upon the decree as it then stood the Master was not authorised to compute interest, the Court held the exceptions of Birch to be good and sufficient, and allowed the same, and referred it back to the Master to review his report.

The Master, in pursuance of this order, made his further report, dated 23d of December, 1845, and thereby,  
 \* 575 \* amongst other things, found that there was then remaining due from Birch in respect of the purchase money for the estates comprised in the agreements, calculated without interest, the sum of 9491*l.* 18*s.* 2*d.*; and that there was due in respect of the arrears of the annuity of March, 1800, from the 11th day of September, 1822, to the 13th day of July, 1830, the day of the death of the surviving life named in the said indentures, the sum of 2352*l.* 8*s.* 9*d.*; and for arrears of the annuity of May, 1800, from the 18th day of August, 1822, to the 28th day of January, 1841, the date mentioned in his said report, bearing date the 3d of April, 1841, the sum of 5534*l.* 9*s.* 7*d.*

The last-mentioned report was confirmed, and the cause of *Birch v. Joy* came on to be heard for further directions on the

<sup>1</sup> 4 Clark & Finnelly, 57.

24th of May, 1847, before the Vice-Chancellor, when his Honour made an order, which it is not material to state, as it is recited in the order of the Lord Chancellor, made on appeal.

An appeal was presented to the Lord Chancellor against the orders of the 14th of March, 1843, and the 24th of May, 1847.

This appeal came on to be heard before the Lord Chancellor, who, on the 6th of July, 1848, ordered, that so much of the order made on the hearing for further directions on the 24th of May, 1847, as ordered the Master to settle a proper conveyance of the estates to the plaintiff, and declared that the sum of 9491*l.* 18*s.* 2*d.*, the amount of the purchase money remaining due from the plaintiff, ought to be applied in discharge of the encumbrances affecting the estates at the dates of the agreements (except the mortgage for 12,000*l.* to Holford), according to their priorities, as found by the report of the 3d of April, 1841; and so far as it appeared by the reports of that day, and of the 23d of December, 1845, that the amounts remaining \*due in re- \*576 spect of the annuities were the first in priority of such encumbrances (after the mortgage to Holford), and together exceeded the sum of 9491*l.* 18*s.* 2*d.*; and it was ordered that the plaintiff should pay that sum, so far as it would go, in clearing off the annuities; and that such persons as the Master should appoint should convey the estates to the plaintiff, subject to the mortgage to Holford, and should deliver up all title deeds and papers relating to the said estates, — should be reversed. And the statement in the order of the 14th of March, 1843, “that, upon the decree as it now stands, the Master was not authorised to compute interest,” was ordered to be struck out; and so much of the order as held the plaintiff’s exceptions to the Master’s report of the 3d of April, 1841, to be good and sufficient, was ordered to be reversed. “And his Lordship doth declare that, according to the true construction of the agreements of the 22d of February, 1812, and the 24th of October, 1812, interest at 5 per cent. per annum, from Michaelmas, 1812, is payable by the plaintiff, Wyrley Birch, on the sums of 25,000*l.*, 16,500*l.*, and 16,500*l.*, amounting together to 58,000*l.*, mentioned in the first agreement; or the sums from time to time remaining due in respect thereof; and that no interest on either side is payable in respect of the remainder of the purchase money.”

The present appeal was brought against this order.

1851. June 2.

*Mr. Stuart* said that he was instructed on behalf of the respondent to apply that this appeal might be advanced for hearing. He was proceeding to state special circumstances in support of his application, when

THE LORD CHANCELLOR (LORD TRURO) said that the application was irregular. All applications of this nature must  
\*577 \*be made before the Appeal Committee. That was the settled rule of the House.

LORD BROUGHAM. — If we did not act on this rule, we should have motions in Court every morning, and (as is perhaps the case in this instance) without notice to the opposite party. There must be a petition to the Appeal Committee.

Application refused.

1852. March 18, 19.

*Mr. Bethell* and *Mr. Selwyn* for the appellant (*Mr. Flather* was with them). — This decree is wrong in form, as well as substance. Nothing was said in the first decree of the Vice-Chancellor about interest on the purchase money. The annuities were declared to have ceased. The Master was directed to inquire what were the encumbrances affecting the estates, to state their respective priorities, and what sums of money had been paid by Birch in respect of them, and what was due for principal and interest in respect of those encumbrances, and what was due from Birch in respect of the purchase money. On that decree the Master had no authority to inquire as to interest on the purchase money. Joy appealed against that decree, but only so far as related to the declaration regarding the annuities. If the prayer of the petition of appeal comprehended any thing relating to interest on the purchase money, nothing was done upon it; and the decree itself having been confirmed in this House, except so far as related to the annuities, became thereby incapable of being afterwards altered. It is a plain proposition of law, that if a decree is sustained, a Court cannot, upon further directions, add to the terms and conditions of that decree, especially after it has become final upon an appeal being made to this House.

\*578 \* [THE LORD CHANCELLOR (LORD ST. LEONARDS). — That which is unappealed from remains as before. LORD BROUGHAM. — The judgment of this House does not affect that part

which is not appealed from. Your present argument merely amounts to saying that the party here is out of time. That is a topic in an argument, but nothing more.]

It is something more here. If a party to a decree appeals only against one portion of it to this House, he must be taken to admit the correctness of the rest.

[THE LORD CHANCELLOR. — I do not agree with that proposition, nor do the circumstances of this case warrant it. Joy was an annuitant; he had also a claim, which he has since established, in respect of the purchase money. He appealed against this decree, so far as it affected the notices relating to the annuity; but that did not touch the question as to his claim on the residue of the purchase money. How his right to bring another appeal may be affected by the rules of this House as to time is another matter. LORD BROUGHAM. — Has this House ever laid it down that, if a party appealed against part of a decree, he was for ever shut out from appealing against the rest? THE LORD CHANCELLOR. — He had two rights, — as to the annuities, and as to the purchase money. He appealed as to the annuities. The only question before the House was as to them: the House dealt with that question alone, and put the other part of the matter into a course of further inquiry; and on that inquiry was founded the decree, which is the subject of your present appeal. The jurisdiction of the House in this matter is not affected by what has already been done.]

Then as to the decision with regard to the claim for interest. The decision of Lord Cottenham in the Court below, proceeded on the ground that the words in the second agreement, excepting from the payment of interest “the remainder of the purchase money,” meant only the remainder \* of the sums of \*579 16,000*l.* and 4000*l.* which was not exhausted in the payment of the annuities, not the 58,000*l.* which remained unpaid. This was a mistaken construction.

[THE LORD CHANCELLOR. — He thought that those words applied to such parts only of the purchase money as were to be paid, not to such parts as were to be secured by remaining on mortgage.]

Then, as to the substance of the decree. Joy, in his petition of appeal, did not ask that the decree might be varied by directing the Master to give him interest; he only asked that the Master might ascertain what was due for principal and interest on the encumbrances affecting the estate. The Master proceeded to make

the inquiry, and, as the result of various calculations, found that a sum of 52,571*l.* was due. The finding was excepted to, and the Vice-Chancellor set it aside entirely, declaring that, "upon the decree as it now stands, the Master was not authorised to compute interest." An appeal was made to the Lord Chancellor, who set aside the report in part; but his decree is open to a charge of inconsistency; for while he declared that the purchase money, as purchase money under the contract of sale, did not carry interest, yet, treating the original contract of sale as comprehending the sums which were to be secured by the mortgage, and so making them liable to interest by way of mortgage, he held that the exemption from interest of "the remainder of the purchase money," contained in the second agreement, applied only to the part of the 20,000*l.* which then remained unpaid. The question now is, whether that is a correct construction of the agreements, or whether the second agreement does not exempt this appellant from payment of interest on the whole of the unpaid money *until* a title has been made and the conveyances executed. In

\* 580 the decree it is said that \* "no interest on either side is payable in respect of the remainder of the purchase money." What is the meaning of that phrase? Its meaning must be ascertained by reference to the other parts of the same instrument.

The decree of the Court below was founded on the construction of the second agreement, which seems to have been treated as a confirmation of the first. The first agreement had provided that Birch should be a mortgagor of part of the estate from March, 1812; and Lord Cottenham thought that that was untouched by the second agreement. He therefore disapproved of what the Master had done; for the Master had given interest on the whole of what was due, when he ought to have given it only on part. It is clear from this, that if it had not been for the mortgage on the 58,000*l.*, Lord Cottenham would not have thought that there was any interest payable at all. He said that the 58,000*l.* were not to be paid till the conveyance was executed, but were to be converted from purchase money to mortgage money; that, however, was only to be on the happening of a given event. Birch knew what was the difficulty in the way of the completion of the purchase, and so he said he would pay on a given day, or pay interest from that day if the purchase was completed; but that, if not completed, he should not be liable to interest. This was plainly the meaning of

both parties. Lord Cottenham called this latter part of the arrangement a "contract of mortgage, and not a contract of sale."

[THE LORD CHANCELLOR.—I think he intended to say that it was a contract of sale with a contract of mortgage superadded. Then the question is, whether the mortgage was consequential on the non-execution of the conveyance.]

Lord Cottenham, in his judgment, seemed to think the provision for the mortgage contained in the first contract was unaffected by the non-execution of the conveyance to \*Birch, \* 581 and that, at all events, that mortgage contract was to be carried into execution. That was not so. The contract for the mortgage is not independent of the completion of the contract of sale; and the title to the mortgage was not to be granted till the sums constituting the 58,000*l.* became payable; and they did not become payable till the conveyance had been made. This appears by the words of the contract. The agreement says that the interest shall not commence until Lady Day next, "in case the title shall be perfected, and the conveyances and the other assurances of the different estates are executed by that time; and if not, then interest is to commence"—when?—"on the execution of such assurances." It is clear from this passage, that the purchase money which is to carry interest is that purchase money which remains unpaid after the completion by Colhoun of his part of the contract. The purchase money which, under the first agreement, is not to pay interest until the contract is completed, is the same purchase money exempted from interest under the second agreement,—it was the purchase money "remaining unpaid." That description comprehends the sums constituting the 58,000*l.*, as well as the remainder of the 10,000*l.*; nevertheless, Lord Cottenham thought that this agreement did not include those sums.

[THE LORD CHANCELLOR.—What do you contend with respect to the rents? We cannot dispose of this question without knowing something of them. Lord Cottenham considered that, as regarded the 58,000*l.*, that sum was impressed by the contract with the character of mortgage money, and therefore that there was a mortgage in equity, not depending on the time of the conveyances, but on the contract. If the contract was not executed, there would be no mortgage; but suppose the contract to be completed,



then the 58,000*l.* would be taken from the 95,000*l.*, and

\*582 \*would form mortgage money in equity as a charge on this estate.]

Lord Cottenham fixed on the appellant the liability to pay interest on the 58,000*l.*, not as a purchaser, but as a mortgagor; yet the relation of mortgagor and mortgagee cannot arise till that of vendor and purchaser is discharged. Birch, by taking possession of the rents and profits, may have made himself a trustee of them for the vendor; but that cannot affect this question, which depends entirely on the words of this agreement.

Suppose this to be an agreement devoid of any provisions as to interest, conveyance, and receipt of rent; suppose it to be a common contract of sale, and the purchaser to take possession, and that that possession was provided for in the contract, though at that time the vendor was not in a condition to convey. If it should turn out that the contract could not be performed at the time, the purchaser would be regarded as the owner of the estate, and the vendor as the owner of the purchase money. The purchaser so taking possession must, when the contract was completed, pay an equitable rate of interest. Then how would the case be varied by there being special provisions in the agreement? Take the first of them, — that possession shall be given to the purchaser at a fixed time, but that the money is not to be paid till there is an actual conveyance. The general effect of the act of the purchaser in taking possession would be excluded by these special provisions; and here they seem to be in terms excluded. The whole contract fairly interpreted is this: Colhoun asks Birch to buy the estate, admitting it to be deeply involved. Birch consents to pay a large price for it, provided, as he says, “you get together these mortgages and annuities, and on a given day convey to me; my purchase money shall then be paid, and I will myself pay cer-

\*583 tain sums of money to keep your leases alive, and pay \*off the most pressing annuities, on the terms of my being put into possession; but the terms of my possession are to be, that I am not to pay rent, or to account for rent, but to remain in possession till you have completed your contract, by bringing in the encumbrances.” The reasonableness of such a contract would depend at that time on what Colhoun believed to be his power of getting in the encumbrances, and discharging them. The after-circumstance of postponing the execution of a part of this contract

cannot affect the contract itself. It might be that, if the postponement was occasioned by the act of the purchaser, he would be liable to interest; but that is not the case here.

[THE LORD CHANCELLOR. — Suppose your construction of the contract to be correct, would not the Court put some fair boundary to the advantages and disadvantages of the two parties, and consider possession in such a case as bringing with it liability to interest under the general rule of the Court?]

If the Court did so, it would assume that the stipulations had been introduced *alio intuitu*, and that the case must be regarded simply on general principles as respects performance and long delay. But even then the Court would look at the circumstances, and as the delay was found to arise from the fault of the vendor or of the purchaser, would compel one or other of them to pay interest. But in that case the Court must treat the particular stipulations as abandoned on both sides. That cannot be done in this case. Here is an express consideration given by Birch for these unusual stipulations, which cannot, therefore, be disregarded. He not only advances money to pay off encumbrances, but he waives all claim for dilapidations. These advances must, no doubt, be attributed in discharge of so much purchase money.

[THE LORD CHANCELLOR. — But that claim would have been \*relinquished forty years ago, if the purchase money \*584 had been paid.]

Birch has been during all that time in a very embarrassing situation. He has not been able to carry his estate into the market, to improve it by buildings, to settle it for the benefit of his family, or to deal with it in any way like an owner; while, on the other hand, he has been obliged to make large advances for the encumbrances, and to sacrifice other property in order to meet the demands upon this estate.

[THE LORD CHANCELLOR. — How has he assented to be charged with these encumbrances? Does he claim to be himself an encumbrancer for their amount, or are they to be attributed to the purchase money?]

As he claims specific performance, they must be attributed to the principal of the purchase money, as a discharge of so much of it at the time they were paid. The Master has wrongly attributed them first in discharge of the interest on the purchase money, and only then applied them in discharge of the purchase money itself.

He has treated Colhoun as the creditor in an ordinary debtor and creditor account, and the debt as carrying interest. That is wrong, on the general principle of law, — “*quicquid solvitur, solvitur secundum modum solventis*,” — and the payments ought to be attributed in the first instance to the discharge of the principal itself.

[THE LORD CHANCELLOR. — But would not interest run against the rents of which you are in possession? Ought all to be attributed to the discharge of the purchase money?]

Certainly, because Colhoun, by his agreement, had bound himself to pay off the encumbrances, and the arrears of interest on those encumbrances are to be attributed to the default of Colhoun.

Birch has, therefore, a right to deduct the payments he \* 585 makes for principal and interest of these \* encumbrances from the purchase money which is due by him. It would be strange, as it is remarked in a great legal work, if equities could arise to a party from his own neglect. Birch is entitled to specific performance, and has been asking for it in this Court since 1825; he has paid 200*l.* out of his own purse to enable Colhoun to come to this country to arrange with the encumbrancers, and difficulties have always been interposed by Joy, preventing the accomplishment of this purpose. The circumstance that during that time Birch has remained in possession of the estate, is no reason in equity why he should now be deprived of the benefit of this specific agreement. It is not the act of taking possession that alone can decide this case. If Colhoun had completed his title at Lady Day, 1813, he would not have been entitled to interest; yet Birch would then have been in possession five months. The words of the agreement must govern the rights of these parties. Those words show that there is no sound distinction between purchase money and mortgage money: the whole is called purchase money; and the clause of exemption is applicable to the whole. The only stipulation in the first agreement as to interest has reference to the sums constituting the 58,000*l.*; and the words which, in the second agreement, release Birch from the payment of the interest, must be referred to those by which he had before undertaken to pay it. Both relate to the same purchase money. The execution of the conveyances was the condition precedent to Birch becoming liable either to rent or interest. If it was otherwise, it would be to the advantage of the vendor to allow the contract to remain incomplete.

*Mr. Stuart* and *Mr. Rolt* (*Mr. Spencer Follett* was with them) for the respondents. — The object of this appeal is to permit the purchaser of \* an estate to keep the purchase \*586 money, to enjoy the estate, and to receive the rents for a period of nearly forty years, but not to pay interest. The expressions of the judgment in the Court below, where the term “purchase money” is applied indifferently to the 20,000*l.* as well as to the 58,000*l.*, may not be clear; but the purport of them is plain. Lord Cottenham treated the whole original sum as purchase money; part of which was to be paid at once, and part was to remain unpaid; but interest was to be secured on the latter portion by way of mortgage. The first agreement, after noticing the encumbrances on the estates, declares that the purchaser agrees to grant a mortgage to the vendor of all the estates, for securing the three last-mentioned sums of 25,000*l.*, 16,500*l.*, and 16,500*l.*, with legal interest from Michaelmas next. The act of one side waiving the claim for dilapidations is stated as the ground for the other waiving the claim for payment of interest; but that cannot be so, for the claim for interest is very large, and applies to a long period of time, while the claim for dilapidations is very small, and relates only to a few months; and no one could ever have thought of setting off one against the other. Besides, even as to the dilapidations there is an exception; for as to some of them Birch was to have a claim. On this bare statement of facts, therefore, it is clear that there was not sufficient consideration to the vendor for giving up his claim to interest; and if there are any words which appear to have that meaning, they must be overruled by the general answer of the instrument. Certain general principles, and not any specific expression, must govern the decision of this question.

There was no serious difficulty of title in this case; the difficulty was, in fact, that of getting rid of the encumbrances. The encumbrances were, of course, to be paid out of the purchase money. If the title to the estates was \* approved of (and \*587 no objection was ever made to the title as such), Birch, on being put into possession of part of the estates, was to pay 16,000*l.* in June, and 4000*l.* more at Michaelmas, 1812. The agreement is not very distinctly worded, but it is evident that the parties meant that, on Colhoun putting Birch into possession, Colhoun was to receive the money, and then to make a title free from encumbrances. Birch was the first to make default in the perform

ance of these arrangements. The 16,000*l.* and the 4000*l.* were not paid at the time stipulated. One payment of 10,000*l.* was made and the other 10,000*l.* became the subject of a separate agreement. It is impossible to say that the words in this second agreement, "the remainder of the purchase money," as to which "interest is not to commence till Lady Day next," can mean only the remainder of the 20,000*l.*, for that was to be paid on Lady Day next, and the parties could not make a stipulation as to that beginning to bear interest at the very moment at which they were stipulating that it was to be paid. The agreement contemplated the probability of the contract itself not being completed ; and, for reasons in which both parties agreed, it was settled that the payment of interest on what remained due, in consequence of the non-completion of the contract, should not commence till a certain day.

In the mean time, a complete change of ownership took place in the property ; and on that change the ordinary rule of equity must apply. Birch was not ready with the money he was bound to pay, and that circumstance created the necessity for a modification of the first agreement. After what had occurred, there was no discretion in Birch to return Colhoun the rent, or to pay interest on the amount of the purchase money. He was bound by the ordinary rule, which, under such circumstances, makes \* 588 interest absolutely \* payable. Even if he had not in fact taken possession, but might have done so with safety, as he might here, from that moment he would have been liable to pay interest. *Binks v. Rokeby*.<sup>1</sup>

With reference to the conduct of the parties, it may be observed, that when the 200*l.* were sent to Jersey to enable Colhoun to come to London to arrange the encumbrances, he did come at once, but could not accomplish what he came for, as Birch did not advance the sums necessary to pay off the encumbrances. There is no evidence of any default, except on the part of Birch himself.

*Mr. Selwyn*, in reply. — What the appellant contends is, not that the expression, "remainder of the purchase money," applies to the 58,000*l.* alone, but that it applies to whatever remains unpaid after the completion of the contract ; and that that con-

<sup>1</sup> 2 Swanston, 224.

tract cannot be said to be completed till a good title has been delivered.

**THE LORD CHANCELLOR.** — **My Lords,** — In this case, the House has now, in the year 1852, to consider what is the true construction of a contract, which was made in 1812, for the sale of an estate for 95,000*l.*, the completion of the purchase of which it was anticipated would be made within a very few months. I trust that your Lordships will be able so to deal with this case as not to send it back for further consideration in the Court below ; but to make a final order upon it, and at last to put an end, although at this distant day, to this tedious litigation.

The original contract, although not very scientifically framed, is not open to any considerable objection on \* that \* 589 account. The circumstances of the estate were these: it belonged in fee simple to the seller; but it was deeply encumbered, and the seller himself was incapable of paying off those encumbrances, except by means of the money which was to arise from the sale of the estate. There is nothing singular in that circumstance, although this case has been argued at your Lordships' bar as if every seller was to be capable of at once conveying an estate, free from encumbrances, by the payment out of his own pocket of those encumbrances, so as to give a clear fee simple to the purchaser. Unfortunately, in most cases an estate is sold because it is deeply encumbered, and because the owner has not the means of paying off those encumbrances except by the sale of the estate itself, and it is in the natural course of things that where the encumbrances do not exceed the amount of the purchase money, they should be paid off out of the purchase money.

The purchaser here was evidently not prepared with the money at once to complete this purchase, because, although 20,000*l.* were to be paid at an early day, before Michaelmas in the same year in which the contract was made, 16,000*l.* on obtaining possession of part of the estate and having a title, and 4,000*l.* upon obtaining possession of the other estate and having a conveyance, yet these two sums were not then paid. As to the remainder of the purchase money, amounting to 58,000*l.*, the purchaser never assumed to pay any part of it, except by small advances of sums for clearing off encumbrances at different times.

Now, my Lords, it has been truly represented to your Lordships

at the bar, that this is clearly a contract for what I should call execution at Michaelmas, 1812, and both parties anticipated, though all the money was not then to be paid, that at Michaelmas,

1812, the whole business would be concluded. If it had  
\* 590 been so concluded, the purchaser \* was bound by a stipu-

lation in the contract to execute to the seller a mortgage for the three several instalments which make up the 58,000*l.*, and if the business had proceeded regularly, there would have been a conveyance by the seller of his estate to the purchaser in fee simple, discharged of all the encumbrances, and there would then have been a mortgage from the purchaser to the seller for the security of that sum of 58,000*l.* by three instalments: so far there would have been no difficulty. I will only just observe, that the sum of 16,000*l.* was considered as an advance to be paid on the 24th of June; but it was considered to be an advance irregularly made, as it were, upon the contract, because the seller was to allow the purchaser interest upon that sum from the day it was advanced till Michaelmas, the 16,000*l.* not being strictly payable till that time. If the Court had then been called upon to execute this agreement, there would have been no legal difficulty whatever in doing so: there might have been an impediment in point of fact on the part of the seller from not getting in the encumbrances, and there might have been an impossibility upon the part of the purchaser to pay off these encumbrances,—he certainly was not bound to do so under this contract,—but there was not necessarily any difficulty in executing the contract. There is nothing on the face of this contract to give to the purchaser all the rents of the estate from a given day, and to absolve him from the payment of interest on the purchase money, and therefore, if the purchaser is to find a stipulation of that sort in his favour, he must find it somewhere else; it is not in this contract. This contract, if it had been executed by a Court of Equity, would have been executed according to equity and good conscience, and according to the rules of the Court, upon which there cannot be a doubt, nor has there been any difference at the Bar. From  
\* 591 the time at \* which the purchaser was to take possession of the estate he would be deemed its owner, and he would be entitled as owner to the rents of the estate, and would have kept them without account. From the same period the seller would have been deemed owner of the purchase money, and that pur-

chase money not being paid by the man who was receiving the rents, would have carried interest, and that interest would have belonged to the seller as part of his property. A Court of Equity, as a general rule, considers this to follow. The parties change characters; the property remains at law just where it was, the purchaser has the money in his pocket, and the seller still has the estate vested in him; but they exchange characters in a Court of Equity, the seller becomes the owner of the money, and the purchaser becomes the owner of the estate. That is the settled rule of a Court of Equity; and in applying that rule to this contract, the Court would not have had the slightest difficulty.

Before I come to the second agreement, which has been so much the subject of contention (and I think it right to remark that I never heard a case more shortly or better argued), I wish to make this observation on the first, that the only true mode of ascertaining what is the real intention of this contract, is to consider it at first without regard to the second agreement. Lord Cottenham, of whom as a Judge I must always speak with deep respect and great veneration, for the great attention which he always gave to cases, for his eminent abilities, and for his profound knowledge of the law of the Court over which he presided,—Lord Cottenham differed from the Vice-Chancellor. The Vice-Chancellor held, on the two contracts taken together, that no interest whatever was payable under the contracts. I say under the contracts, because it is impossible to read the judgment of that learned Judge without seeing that he \* did not decide that, as a matter of \* 592 equity, interest would not be payable, the rents being retained; but he did decide, that under the contracts no interest would be payable, and he came, therefore, to this extraordinary result, a painful one, I must say, for any Judge to arrive at, that, under the circumstances I have stated, the purchaser entering into possession in 1812, and having the rents assured him from Michaelmas, 1812 (the contract being for his benefit, and considered as a concluded contract from that time), the seller was not only to be deprived of the possession of this property, not only to lose all the rents of his property, but during all the years that this contention has endured, he was not to receive a single shilling of interest for the unpaid purchase money. Lord Cottenham reversed that decision. In order to enable him to do so, he felt himself at liberty to put this construction upon the first contract; viz., that



there was this distinction between the different component parts of the 95,000*l.*, the purchase money, as to interest, viz. the 16,000*l.* and the 4000*l.*, which sums were payable, and not to be secured, and which he called the purchase money, as distinguished from the 58,000*l.*, which sum was to be secured, according to the terms of the original contract, by mortgage of the estate itself, and which he called the mortgage money. Lord Cottenham said : “ I find that this purchase money is divided into two ; that the first portion of it properly constitutes the purchase money payable at a given day, and not to be secured, but to be paid like other purchase money, and that the other part is not payable in the ordinary way, but has the character impressed upon it of mortgage money, and therefore I deal with it accordingly.”

However desirous I may be to arrive at a conclusion that will do justice between these parties, I am bound to say, with \*593 every disposition to meet the views of that learned \*Judge, that I cannot entirely agree with that construction of the original contract. I think that the original contract dealt with the whole purchase money of 95,000*l.*, and that there was throughout the conditions an intention manifested that there was to be a conveyance, and there was to be a title before these different sums were to be paid. It is true that these sums, which are called mortgage monies, were to be mortgage monies, that is, they were not to be paid down ; but suppose there had been no mortgage stipulated for, but that the sums stood payable as they now stand payable, without that clause then there would be nothing to alter, — everybody would agree that the whole sum was dealt with in these portions, and that the whole sum by these portions was payable. I cannot, therefore, think that that which I must call a violent construction of the language adopted in order to meet a particular equity, was the true construction of the original contract. I am not now speaking of the second contract as something explanatory or subsidiary, but I am speaking of the original contract, and I think that that must be considered as applying, in all its provisions, to the several portions of this money.

A great deal has been said, and much criticism displayed (some of it not quite merited) upon the observations of Lord Cottenham in deciding the question to which I am now referring. That noble and learned Lord must not be understood to say that there was to be an absolute mortgage made before conveyance made.

He meant no such thing: the contract contemplated no such thing; it supposed that there would be first a conveyance and then a mortgage. But then the noble and learned Judge had, rightly, this in view, that in a Court of Equity that was considered to be done which was agreed to be done, and therefore upon the true construction of this contract I am bound to consider it as carried into execution. For the purpose of this \*construction, I hold, therefore, that in equity there was a \*594 conveyance from the seller to the purchaser, and that there was a mortgage from the purchaser to the seller. That is the way in which it will be executed, and considering the agreement as it would stand if executed, I give to it that construction. And I am quite satisfied that what my noble and learned predecessor meant to lay down was, that this money, which was payable at these several periods, was impressed with the character of equitable mortgage money, to be secured by a legal mortgage when the opportunity arrived; and from the very date of the contract this stipulation operated as an equitable mortgage, and bound the estate accordingly. In that view I entirely concur, and I think it well founded on principles of equity.

That, however, does not dispose of the case as regards the question now before your Lordships, and we then come to what really has produced all the difficulty, — a memorandum of agreement, dated 24th October, 1812, — that is to say, a date just after that period which had been fixed upon by the parties as the proper period at which the contract should be performed in full. The contract has not been performed by either party: the seller could not convey the estate free from encumbrances, the purchaser had not paid any part of the 16,000*l.* or the 4000*l.* The only difficulty in the performance of the agreement resulted from the amount of the encumbrances, which it was found impossible to pay off; this operated as an impediment in the way of a conveyance, but there was no objection to the title itself. The parties therefore said: "This contract ought to have been completed at Michaelmas last. You, Mr. Birch, have not advanced any money, and I, Mr. Colhoun, have not conveyed the estate: you shall now advance money to the extent of 10,000*l.* forthwith," that is the word, "and with these monies you shall obtain the \*renewals of the leases which have been before stipu- \*595 lated for, and you shall pay off certain encumbrances."

That is the first stipulation, and that is against Birch. Then the stipulation for Mr. Birch is, that he shall have immediate possession of all the estates which are in possession, and that he shall be entitled to all the rents of all the estates held by tenants as from Michaelmas (looking at the first contract as from Michaelmas, 1812); and there is this remarkable provision, that if the rents, and if the possession of the tenanted parts, could not be immediately obtained, then the seller was to be charged with so much *bond fide* rent, by way of improvement, as could be obtained — for that is the meaning of it — as could be obtained from those holdings which the tenants had not given up. Observe, my Lords, how fortunate that is, because it shows the character of ownership which is intended to be impressed upon Mr. Birch in giving him that possession. That is also proved by other parts of the contract, because he is to have the liberty to cut the timber, and to make such improvements as he thinks fit. Mr. Birch, under that contract, entered as owner of that estate, with all the rights of the owner, and with more than the rights of the owner, because he had a stipulation that if the rents of those parts that were held by tenants could not be immediately recovered, the seller was to make good to him whatever rents could be proved to be the improved value, beyond the rents actually paid. Then they suppose by this contract that the sale itself would be immediately concluded, and then come the words upon which the whole difficulty in this case has turned, and upon which there has been such a variance of opinion between the learned Judges in the Courts below. After stipulating for Birch having possession, the agreement proceeds thus: “The conveyances and other assurances shall be prepared and executed \* 596 as soon as the different \* existing difficulties in the title are removed, and every possible exertion shall be made to that end. The interest,” — and here are the words which have puzzled the Courts, — “the interest of the remainder of the purchase money shall not commence till Lady Day next, in case the title shall be perfected and the conveyances and other assurances of the different estates are executed by that time.” That is, of course, an inaccurate expression, put negatively instead of affirmatively, — that it shall commence at that time, if the titles and conveyances shall have then taken place, but not before. Then it goes on: “And if not, then the interest to commence upon the

execution of such assurances ; and in consideration thereof, any claim on account of dilapidations shall be waived by Mr. Birch, except as hereinafter mentioned."

The Vice-Chancellor decided, upon these words, that no interest whatever during forty, or four hundred years, if it could have been held for that time, would have been payable for the purchase money, though the purchaser, during the whole time, should be in possession, receiving the rents. The Lord Chancellor held that the words " the interest of the remainder of the purchase money " meant interest on so much of the purchase money as remained after the payment of the 20,000*l.* ; that is to say, after the payment of that which was to be paid down ; thus referring to that portion which was to be secured by mortgage. If the construction which I have submitted to your Lordships is the true construction of the original contract, I cannot see my way to the construction which was arrived at by that noble Lord, in saying that " the remainder of the purchase money " merely means that part. I cannot see where the line of distinction is to be drawn. It appears to me that those words relate to the whole of the unpaid purchase money, however disadvantageous that might be to the purchaser.

\* Let us look a little further, to see what is the meaning \*597 of this contract. It is said that this enormous benefit to the purchaser was obtained by his waiving the right to claim for dilapidations. If this contract had been executed within a limited time, then the argument would be very good, because the dilapidations must have been of small amount ; for in the consideration of these parties they only referred to the possession from Michaelmas, 1812, to Lady Day, 1813 ; and it is perfectly absurd to suppose that such dilapidations could amount to any considerable sum. The case, however, has been argued as if we were talking of valuable considerations in settlements ; but that has nothing to do with it. We are not considering whether it was or was not a consideration for the agreement, but whether it was such a consideration as would lead your Lordships to construe ambiguous words in this way, that the parties meant, that for a sum of 300*l.* or 400*l.*, which would probably cover the amount of the dilapidations, a man could be expected to give up the interest of 95,000*l.*, the amount of the original purchase money of his property, after having denuded himself of the posses-

sion of that property, and having handed it over to the purchaser, and to strip himself of every shilling coming from his property for a period of forty years. It has been asked, if this matter had been brought forward at Lady Day, 1813, would there have been any difficulty, and it is supposed logically to follow, that if there was no difficulty at Lady Day, 1813, there cannot be any difficulty at Lady Day, 1852. The one thing does not follow from the other; the reasoning is not accurate.

If the contract had been carried into execution at Lady Day, 1813, there would have been no difficulty; whatever the terms of the contract gave, the purchaser would clearly have been entitled

to; but when that is attempted to be carried on for forty \*598 years (the bare statement \* of it appears to be contrary to all possibility of intention), and when you know that the parties never had such a long delay in contemplation, when nobody could have asked for the performance of such a contract, and no Court of Equity would have executed such a contract, but that, if a proposition of that sort had been put before the Court when Mr. Birch filed his bill in 1825, the Court would have dismissed the bill filed for such a purpose, and in all probability with costs: — it is plain that we cannot now treat the contract as allowing such a state of things. My Lords, a Court of Equity interposes only according to conscience. If a man has got a contract, and by applying some strict meaning to words which were never intended to have such a meaning, insists upon a construction according to that strictness, the Court, seeing that no such thing could have been intended, would refuse its assistance to enforce his demands.

It does not follow now, because a strict construction would have given to Mr. Birch a limited right, had he sought to enforce the performance of this contract in 1813, that he can take the great range of forty years, and, at your Lordships' bar, insist upon the same construction, and say that he is now entitled to an extension of that benefit down to the very hour I am addressing your Lordships.

There is another view which, after an anxious consideration of this case, I have arrived at, and which I submit to your Lordships is the true view. It will not make a great deal of difference in the result of the judgment as it stands; but whilst it enables your Lordships to administer the clear rule of justice between

these parties, and satisfy every word capable of being satisfied in this contract, and every equity which either party has in this case, it will not do the slightest violence to any words in either of the agreements, but will afford an easy and natural construction of them \*with reference to the clear and manifest \*599 intention of the parties. It will bring out a result not very different from that which has been arrived at, but depending wholly upon a different construction. I think that this second agreement was entered into in the belief, and that its stipulations depended wholly upon that belief, that the contract was capable of being executed within a limited period, namely, Lady Day, 1813, or very shortly afterwards. When, however, that time arrived, it was clear that the parties could not carry out the contract so intended; and then, not only by the express words of the second agreement, but by the clear intention of the parties, by every thing which is due to the interests of them both, by every sound rule of construction in judging of men's contracts, I think you will arrive at the conclusion that this agreement ceased to operate, and that the parties were remitted to their rights under the original contract.

The way in which I arrive at that conclusion is this. It is stated that, under these arrangements, Mr. Birch would not be liable to Colhoun, or to any other person, for any rent: he was to hold free from rent. Then come these two important clauses, — that, “In the event of it being found impracticable to make out a satisfactory title to Mr. Birch, and the purchase not being completed, Mr. Birch shall account with Mr. Colhoun for all timber which he may have felled, and Mr. Colhoun shall make allowance to Mr. Birch for all improvements he may have made upon the estate,” — and so on. Did that clause contemplate the events which have happened? Did it provide for its being found impracticable to make out a satisfactory title and the purchase not being completed at the end of forty years? It contemplated no such thing. It contemplated an immediate and early impracticability, which would be discovered in one way or the other, as events would arise, at or very shortly \*after Lady Day, \*600 1813, and which would then be finally arranged. The very nature of the account shows that. Mr. Birch is to account for the timber he may have felled, and Mr. Colhoun is to make allowance for all improvements. That would be very sensible if you took it during that short period; but there would be no sense in a stipu-

lation of this sort, that Mr. Colhoun was to have no interest for all this great number of years, that Mr. Birch was to have all the rents, and then at the end of that period, the contract being rescinded, Mr. Birch was to keep all the rents, paying no interest, and was simply to pay back that which he had got through felling timber, and to be paid for all improvements. My Lords, I say that the thing is so insensible and so inconsistent with the rights of the parties, or any possible intention of the parties, that no Court of justice could put that construction upon this clause. But in the second clause, the alternative is still more clear: "Provided that when the title is made out, and the requisite conveyances and assurances are ready for execution, and it shall not be convenient to Mr. Birch to advance a sufficient sum to discharge Sir John Murray's mortgage, in such case Mr. Birch shall account with Mr. Colhoun for the interest of such mortgage money from such period up to Lady Day next." Is not that perfectly conclusive to show the intention of the parties? What was the period for which this provision was made? The period from Michaelmas, 1812, till Lady Day, 1813. They make no provisions beyond that, they take it for granted that the business will then be terminated. If the purchase had been completed, it would have been on or about Lady Day; therefore they stipulated that the period in respect to which interest was to be paid by Mr. Birch (Mr. Birch then becoming the owner), and not himself having the money to pay off the demands on the estate, the interest of which would be  
 \* 601 thrown on \* Mr. Colhoun, Mr. Birch, from that period, namely, when he ought to have advanced the money up to that Lady Day next, is to pay interest on the mortgage money.

This is a very important part with reference to what I before stated, "And it being uncertain whether it will be in the power of Mr. Colhoun to give up the actual possession of some parts of the estates to Mr. Birch, in such case Mr. Colhoun shall allow Mr. Birch what shall appear to be the difference between the present rents and the *bond fide* improved rents." Every word here points to an immediate conclusion of that contract, or an immediate impracticability shown, and a dissolution of the contract. Either one way or the other, it points to an early and final settlement of the matter. The very provision of ownership in Mr. Birch, and the disposition as regards the property itself, point to that, and to no other conclusion.

Then comes this last and important passage : " It is agreed that nothing in the above arrangements shall be construed to alter any part of the original contract for the sale of the Wretham estates except as herein varied." Then, with the exception of the 10,000*l.* to be forthwith advanced, with the exception of possession of the estates being given to this gentleman, with the exception that interest is not to be paid by him upon this large sum of money till Lady Day, 1813 (a most valuable concession to him), with these exceptions alone, the original contract is to prevail.

I shall now submit what is the true construction of this second agreement. Dovetailed, as it ought to be and will be by your Lordships, into the first agreement, and made consistent, not inconsistent with it, doing no violence to the words, — for I do not advise your Lordships to do any violence to the words, — but giving them a construction according to their natural import, and looking at the intention of the parties, to do that which is the clear equity and \* right as between them, I submit that the \* 602 true construction is, that the case on the second contract has wholly failed. Not taking from Mr. Birch any one single benefit which is given to him by that contract, but yielding to him now every thing that he was entitled to, the clear and manifest construction of this contract is, that the parties are now bound to execute, so far as they remain unexecuted, the terms of the original contract. By that original contract, the remainder of the money, after the payment of the 20,000*l.* (and you will recollect that the 20,000*l.* were to be paid by Michaelmas, 1812), the remainder of the purchase money was to be secured by mortgage, with legal interest.

I propose, therefore, that your Lordships should retain the decision of Lord Cottenham, so far as it reversed that of the Vice-Chancellor, which I think it is impossible to sustain ; but that you should reverse the decision of Lord Cottenham so far as it declared that the true construction of the agreement was, that the " remainder of the purchase money " meant only the remainder after the payment of the 20,000*l.* But you must accompany that decision with this declaration, that the 10,000*l.* stipulated to be paid under the second contract should be deemed and considered as paid in part of the 20,000*l.*, and that the remainder of that sum of 20,000*l.*, till it was paid, and as it was paid, would carry interest at four per cent., that being the rule of the Court, the purchaser



being in possession of the rents. Then, to give effect to the very words of this agreement, and to that stipulation in it, that interest should not be payable on the residue of the purchase money till a particular day, I propose that you should give to Mr. Birch the benefit of the interest upon the whole sum, except those payments which I have mentioned, till Lady Day, 1813. He must give up the dilapidations; but he will have the interest in his own

\* 603 pocket, and all the rents \* during those six months. The better way will be not to charge him with interest on the remainder of the 20,000*l.*, but to consider the 10,000*l.* as satisfied by the payments he made, and then to absolve him from interest on the whole residue of the 95,000*l.* until Lady Day, 1813, and then the remainder of the purchase money will bear interest, calculated from that time, at five per cent. The Master's report in that respect is perfectly right.

I advise your Lordships not to part with this case till you have framed such a decree as will put a final end to the whole litigation. I will sketch out a decree, and the House will expect the parties to meet and assist in effecting this purpose. If they will furnish to your Lordships an agreed state of facts as to the sums, there will be no difficulty in applying the principle which your Lordships lay down. The sum shall be stated in what will be your Lordships' decree, operating at once upon the exceptions and further directions, and that will finally close this suit, which, instead of lasting forty years, ought not to have lasted four months.

LORD BROUGHAM. — Three constructions of these agreements have been suggested in the progress of this cause: one here, the other two in the Court below. Respecting that put by the Vice-Chancellor I have no doubt whatever. I agree entirely with my noble and learned friend, that it is quite impossible that that decree can stand. As to the judgment of my noble and learned friend the late Lord Chancellor Cottenham, I had once considerably more doubt than I feel now. The inclination of my opinion, however, is against his construction in respect of the matter which has been pointed out by my noble and learned friend, and

\* 604 I concur in the course now recommended to your \* Lordships. It has at all events this great advantage, that it gives effect to what I conceive to have been the intention of the parties on executing both these instruments. The course which

my noble and learned friend has proposed is exactly similar to that which was taken some nineteen or twenty years ago, in a case which, I dare say, my noble and learned friend will no sooner hear the name of than he will recollect,—the famous Exchequer case of *Morgan v. Evans*.<sup>1</sup> We took exactly that course about the last day of the session, and put an end to it; taking the course of calling for the learned counsel on both sides to look at what we propounded, and desiring them to favour us with a statement as to the facts to be embodied in the form of the decree. There was then an end of that long-litigated case.

*Mr. Bethell.* — Will your Lordships allow me to ask whether we may have liberty to speak at the bar of your Lordships' House after handing in a state of facts?

THE LORD CHANCELLOR. — I cannot possibly agree to that. It is now simply a question of figures.

*Mr. Bethell.* — Your Lordships are about to prescribe a sum different from either of the former ones, and that sum must be applied according to the fourth schedule of the Master's report.

THE LORD CHANCELLOR. — There can be no difficulty in the application of that sum—not the least—by the principle laid down. The House certainly will not hear counsel at all, and if the parties on both sides will apply the principle on which the House has decided to act, there can be no difficulty.

*Mr. Stuart.* — Your Lordships will probably deliver out minutes to the parties.

\* *Mr. Bethell.* — Will your Lordships direct minutes to \* 605 be delivered before you have this statement from the parties?

THE LORD CHANCELLOR. — I think not. I shall myself sketch out the result of what I have stated to their Lordships, with the view of showing the principle,—that is, of the point decided; but minutes will not be made out until you have furnished the House with the figures.

*Mr. Bethell.* — Then the order of your Lordships' House, in point of fact, will embody the whole working of the application of the sum.

*Order appealed from in part reversed and in part affirmed, with declarations and directions.*

<sup>1</sup> 3 Clark & Finnelly, 159.

An order to the following effect was afterwards entered on the journals: After reciting the facts and the decrees in the Court below, it was

Ordered, that Lord Cottenham's order, so far as it reverses the order of the Vice-Chancellor, which held Birch's exceptions to the Master's report to be good, and so far as it orders the striking out from the Vice-Chancellor's order the statement that on the decree, as it now stands, the Master was not entitled to compute interest, be affirmed; and so much of Lord Cottenham's order as declares that, according to the true construction of the two agreements, interest at five per cent. from Michaelmas, 1812, is payable by Birch on the sum of 58,000*l.*, and that no interest on either side is payable on the remainder of the purchase money, and as directs the Master to review his report, be reversed; and it was declared, that in taking the account of what remained due from Birch in respect of the purchase, the Master was authorised to compute interest in respect of the purchase money, and that the second agreement, in the event which happened, ceased to operate on the first agreement, as regards the payment of the residue of the purchase money beyond the sums agreed to be advanced by Birch under \* 606 the second agreement, stated \* to amount to 10,000*l.*; and that under the second agreement, Birch was entitled to the rents, without account, from the 29th September, 1812, to the 25th March, 1813, and was not, during that period, bound to pay interest on any part of the purchase money beyond the sums agreed to be advanced by the second agreement; and that the payments by Birch before 29th September, 1812, and 25th March, 1813, and allowed by the Master, are to be attributed to the sums agreed to be advanced under the second agreement, and Birch is not to charge, or be charged, interest thereon; and that for the payments so made during that period, credit is to be given to Birch as in respect of the 16,000*l.*, and 4000*l.* agreed to be paid by Birch before Michaelmas, 1812; and that the payments first made by Birch, and allowed by the Master, other than the payments so made during that period, shall be attributed to the remainder of the sums of 16,000*l.* and 4000*l.* so agreed to be paid. And it was further declared, that after 25th March, 1813, the parties were remitted to their rights under the first agreement; and that, according to the true construction of the first agreement, Colhoun is deemed to be an equitable mortgagee for the several sums of 25,000*l.*, 16,500*l.* and 16,500*l.*, with interest at five per cent. per annum from 25th March, 1813; and it is directed, that the account taken by the said Master be varied and rectified according to these declarations; but that in other respects it shall stand upon the principles upon which the Master's report was founded.

The order went on to state the sums due from Birch, and directed payment thereof, and then ordered all proper conveyances to him to be executed by *all* necessary parties. — Lords' Journals for 1852, 19th March, p. 56.

1852. March 22, 25.

WILLIAM LEWIS, WILLIAM OVERTON, and DAVID	}	<i>Appellants.</i>
HUGHES, . . . . .		
JAMES HILLMAN and ANN SUSANNA, his Wife,	}	<i>Respondents.</i>
and others, . . . . .		

*Annuity. Purchase. Solicitor. Jurisdiction. Practice. Trustee Act.*

If a trustee has a power or a trust to sell property, he must *bonâ fide* have some one to deal with in the sale of it.

If an attorney or agent can show he is entitled to purchase property, notwithstanding his character of attorney or agent, yet if, instead of openly purchasing it, he purchases it in the name of a third person, as his trustee or agent, without disclosing the fact, such purchase is void.

Under the Act 10 & 11 Vict. c. 96, it is entirely a matter for the discretion of the Court to direct a bill to be filed, if such a mode of proceeding shall appear to be necessary; but the Lord Chancellor has the same jurisdiction upon petition as upon a bill.

On a petition presented under that Act, praying for the payment out of Court of money then in Court, and on cross petition in opposition thereto, the Court has full power to declare the validity or invalidity of any deed on which the claim to that money is vested.

*Quære*, — Whether this may not properly be done upon petition alone, without any necessity for filing a cross petition?

Such necessity, if it exists, may be dispensed with by consent.

A. was entitled to a reversionary interest in one-fifth share of certain real and personal estate then held by a devisee for life. A. granted to B. an annuity upon it; the annuity deed, which was registered, contained a power of sale; the annuity fell into arrear, and B. determined to exercise the power of sale. The sale was effected for a sum of 900*l.*; but the purchaser discovered an objection in the memorial registered, which rendered the annuity deed invalid, and he refused to complete the purchase, and obtained a return of his deposit money. The solicitors of B. (acting at the time, as they stated, from motives of kindness to A.) obtained from A., who had not the benefit of any solicitor's advice, an assignment of the reversionary \* interest to L. for \* 608 the sum of 900*l.*, and after the reversion fell in by the death of the tenant for life, claimed the property as the purchasers, alleging that the purchase had been made by L. as their agent and on their behalf. The executors declined to pay them the value of the property, which it was then found

amounted to 1770*l.*, but paid it into Court under the 10 & 11 Vict. c. 96 (the Trustee Act). The solicitors presented a petition to have the money paid out to them as purchasers of the reversionary interest under the deed of assignment to L. A. opposed the payment, on affidavits, which set up a case of deception and fraud practised on him. The parties on both sides agreed that the case should be heard on petition and affidavits as if a petition and cross petition had been filed. The Vice-Chancellor ordered the money to be paid out of Court to the solicitors as purchasers. The Lord Chancellor, on appeal, reversed this order, declared the assignment to be invalid, and ordered the money to be paid back into Court; reserved the costs, and gave either of the parties liberty to make any further application to the Court :—

*Held*, that the Lord Chancellor's order was correct; that the purchase by the solicitors, who were at the time the solicitors of the vendor, was *contrary to the rules of equity and void*; that without any consent the Court had jurisdiction, on petition and cross petition, under the statute, to declare the deed of assignment invalid, as well as to order repayment of the money; that the consent here given waived any possible necessity for a cross petition; and that the order was not bad for not directing a return to the solicitors of the money they had paid as purchase money; for that the leave reserved to either party to make any further application to the Court enabled them to obtain a return of this money.<sup>1</sup>

THIS was an appeal against an order of Lord Chancellor Cottenham, made under the authority of the 10 & 11 Vict. c. 96, entitled “An Act for better securing Trust Funds, and for the Relief of Trustees.” A petition had been presented under this statute disclosing the following facts. In the year 1840, William

\* 609 Mitchell Bloye was \* entitled, under the will of Francis Bloye deceased, to one equal fifth part of the residuary real and personal estate of the testator, subject to the life interest, then existing, of Sir Robert Bloye.

W. M. Bloye, on the 6th April, 1840, granted an annuity to Elizabeth Pratt, widow, for her own and three other lives, the consideration, stated in the deed, being the sum of 600*l.*, and the annuity granted 42*l.* per annum. It was expressed in the deed to be secured by an assignment to Elizabeth Pratt, of the one-fifth share to which W. M. Bloye was entitled under the will of Francis Bloye, of or in the residuary part of the real and personal estate of F. Bloye. The deed contained a proviso that if at any time the annuity should be in arrear for forty days, it should be lawful for Elizabeth Pratt, her executors, &c. to sell the said reversionary share by public auction or private contract, and that the proceeds

<sup>1</sup> See *Stuart v. Bute*, 9 House of Lords Cases, 452 note.

should be applied in the first place to discharge all arrears of the annuity, and all costs, &c.

William Mitchell Bloye died on the 4th of June, 1840. By his will, dated 13th of February, 1840, Ann Susanna Bloye, his wife (now the respondent, Ann Susanna Hillman) and Robert Sewell (who renounced) were appointed his executors and trustees. They were directed to pay his debts, and a legacy of 200*l.* to his wife, and to hold the residue in trust for the benefit of his five children. The wife proved the will.

Elizabeth Pratt, the grantee of the annuity, died 15th January, 1841, intestate, and administration to her estate and effects was taken out by her daughter, Mrs. Georgina Woodman.

In 1845, the annuity fell into arrear; and Mrs. Woodman, in 1846, proposed, under the power in the annuity \* deed, \* 610 to sell the reversionary share on which the annuity was secured. Messrs. Overton and Hughes acted at that time as her solicitors.

The sale was appointed for the 19th of September, 1846.

In order to prevent this sale, Mr. Henry Field, a solicitor, then acting on behalf of Mrs. Hillman, wrote to Overton and Hughes a letter, dated 12th September, 1846, in the following terms: —

“I have received Mrs. Hillman’s instructions to submit the following proposition for the consideration of yourselves on the part of your clients. Mrs. Hillman informs me that the sum of 550*l.* was advanced; that there are 63*l.* due for interest; and allowing the sum of 100*l.* for costs attending the sale of the property, would together amount to 713*l.*; and that for the sum of 250*l.* she will at once convey the whole of her interest to your clients. I shall be obliged by an early communication on the subject, with the view that further expense may be avoided.”

: This proposal was declined by Messrs. Overton and Hughes. At their request Mrs. Hillman was induced to concur in the sale, in order to redeem the annuity out of the purchase money, and her concurrence was testified by the following memorandum, which was printed at the foot of the particulars and conditions of sale. It was addressed to Messrs. Turner and Atherton, the auctioneers employed to conduct the sale.

“I do hereby, as the executrix of the will of my late husband William Mitchell Bloye, deceased, authorise you to sell the rever-

sionary interest referred to in this particular, for not less than 900*l.*; and when sold, I do hereby agree, out of the purchase money, and in consideration of the vendor, Georgina Woodman, administratrix of Elizabeth Pratt, deceased, the annuitant, consenting to the sale thereof at the said sum of 900*l.*, to redeem the annuity

\*611 \* above referred to, upon the understanding that the balance of the purchase money of the above-mentioned property, after payment of your and all other charges and expenses, be paid over to me as such executrix. — Dated 17th September, 1846."

The sale took place on the 19th September, 1846, at the *Norfolk Hotel*, in *Norwich*. Among the persons who attended were Mr. Trundle and Mr. Lake, the trustees of the will of Francis Bloye. The property was purchased by Mr. Atkins, as agent for Mr. Robert Barker, for the sum of 900*l.* The conditions, with particulars annexed, were duly signed, and a sum of 180*l.* was, in accordance with one of these conditions, paid down as a deposit.

An abstract of the title of Mrs. Woodman, as vendor, was afterwards delivered by Hughes to Mr. Herbst Lake, the solicitor appointed by Barker, who thereupon required Hughes to furnish a copy of the memorial of the annuity deed, which being declined, the purchaser's solicitor made an inspection of the memorial itself as enrolled in Chancery, and found, as he stated, that the memorial was invalid in two essential particulars: 1st, that whereas the annuity was granted for the lives of four persons, the memorial stated the annuity to be granted for the life of William M. Bloye, the grantor; and 2dly, that whereas the consideration expressed by the deed, to be paid for the grant of the said annuity, was 600*l.*, the memorial stated the consideration to be sums amounting to 510*l.* only. Mr. H. Lake communicated this objection to Overton and Hughes, and gave notice that his client declined to complete the purchase.

Mr. Hughes then determined to purchase the property on account of himself and partner, at the amount at which Barker had purchased it. On the 4th November, 1846, Mrs. Hill-

\*612 man, acting apparently under their advice, went \* to Doctors' Commons and proved her husband's will. She afterwards received from them the following cash account: —

**Mrs. Hillman in account with Messrs. Overton and Hughes.**

1846, Nov. 27.					
	£	s. d.		£	s. d.
Repurchase of annuity . .	600	0 0	Purchase-money . . . .	900	0 0
Interest to 6th December					
next . . . . .	79	10 0			
Messrs. Turner and Ather-					
ton's charges . . . . .	53	0 0			
Mr. Sewell's ditto . . . .	2	7 0			
Messrs. Tebb's ditto . . .	9	11 6			
Messrs. O. and H. . . . .	35	0 0			
Balance this day handed					
over to you . . . . .	120	11 6			
	£ 900	0 0		£ 900	0 0

The deed of assignment was dated on the 27th November, 1846, and purported to be made between Georgina Woodman, of the first part, James Hillman and Ann Susanna, his wife, of the second part, and William Lewis, of the third part. The deed stated the purchase of the reversionary interest at the price of 900*l.*, out of which were to be paid, in repurchase of annuity and satisfaction of all arrears, the sum of 679*l.* 10*s.* Georgina Woodman, William Hillman, and his wife, concurred in the assignment thereby intended to be made, and the deed then purported to assign all the reversionary interest in question to Lewis. On the 1st of December, a copy of this deed and a copy of Mrs. Hillman's authority to the auctioneer to sell were sent to Mr. H. Lake, the solicitor for Barker, as constituting a good title; but Mr. Lake refused to accept such title, and on the 5th December, called for a return of the deposit and costs, which he then received.

\* On the 14th of September, 1847, Sir Robert Bloye, the \* 613 tenant for life, died, and the trustees under F. Bloye's will then proceeded to collect the funds. Messrs. Overton and Hughes served notice on the trustees to pay over W. M. Bloye's share to them, which the trustees declined to do, but paid the money into Court, under the 10 & 11 Vict. c. 96. The sum thus paid in amounted to 1770*l.* 1*s.* 9*d.* A petition was then presented by Overton and Hughes and Lewis to the Court, under the above statute, praying that the fund might be paid out to Mr. Hughes. This petition, of which due notice was given to all the parties, stated the above facts, and alleged that the contract carried into effect by the assignment was made with Overton and Hughes,



Lewis being a trustee for them. This petition<sup>1</sup> came on for hearing, before the Vice-Chancellor of England, on the 2d of March, 1849, when the counsel for both parties submitted to be bound by the order on the petition in the same way as if a cross petition had been presented. His Honour, after hearing arguments on both sides, made an order, directing that the costs of the trustees should be taxed, and should be paid out of the fund, and that the residue of the sum of 1770*l.* 1*s.* 9*d.* should be paid out to Mr. Hughes. Under this order, a sum of 12*l.* 5*s.* 1*d.* having been deducted for the trustees' costs, the sum of 1757*l.* 16*s.* 8*d.* was paid out accordingly. On the 14th of March, Hillman and his wife presented an appeal to Lord Chancellor Cottenham, praying that so much of the Vice-Chancellor's order as directed that the money should be paid out of Court might be reversed. On the 10th of November, 1849, on the hearing of this petition of appeal, the Lord Chancellor made an order reciting the petition,

\*614 and also \*reciting that the parties had submitted before the Vice-Chancellor of England to be bound by the order made on the said petition in the same way as if a cross petition had been presented by Hillman and the others, and directed that the order of the Vice-Chancellor should be reversed, and the petition of Overton and Hughes be dismissed with costs. The order then proceeded as follows:—

“His Lordship considering that the deed dated the 27th day of November, 1846, in the said petition mentioned, is invalid as between the said appellants James Hillman and Ann Susanna his wife, and the said William Lewis, William Overton, and David Hughes, as an assignment by the said appellants James Hillman and Ann Susanna his wife, of the reversionary interest thereby purported to be assigned to the petitioner William Lewis, it is ordered that the said William Overton and David Hughes do repay, on or before the 19th day of December next, the sum of 1757*l.* 16*s.* 8*d.* (being the amount received out of Court under the order hereby reversed) into the Bank, with the privity of the Accountant-General of this Court, to be entitled ‘In the Matter of the Trusts of Bloye’s Estate, the share of William Mitchell Bloye,’ subject to the further order of this Court; and the said

<sup>1</sup> There were also voluminous affidavits filed on both sides, to which affidavits the Lord Chancellor (Lord St. Leonards), in his judgment in this House, made frequent reference.

money, when paid in, is not to be paid out without notice to the said William Overton and David Hughes; and the said order is to be without prejudice to any question as to any liability of the said William Overton and David Hughes to pay interest on the said sum hereby ordered to be repaid by them during the time the same has been and may be in their hands; and it is ordered, that the appellants James Hillman and Ann Susanna his wife, and also the said William Overton and David Hughes, be at liberty to make respectively such application to the Court in the premises as they may be advised."

\* The appeal to this House was brought against this \* 615 order.

On the 7th of January, 1850, Hillman and the parties claiming to be entitled<sup>as</sup> against Overton and Hughes presented a petition to the Lord Chancellor, in conformity with the leave reserved at the conclusion of his Lordship's order, setting forth all the facts, and praying "That the said deed, bearing date the 27th day of November, 1846, hereinbefore mentioned, might be considered, and if necessary, declared by the said Court invalid and inoperative as an assignment to the appellant William Lewis by the respondent James Hillman and Ann Susanna his wife, of the reversionary interest therein in that behalf mentioned, and that the annuity deed, dated the 6th day of April, 1840, might likewise be considered, and if necessary, declared by the said Court to have been null and void as against the said William Mitchell Bloye, and to be now null and void against the now respondents the petitioners, and that all proper directions consequent thereon respectively might be given by the said Court, and further praying that the sum of 1770*l.* 1*s.* 9*d.* cash in the Bank of England, in the name of the Accountant-General of the said Court, with such interest as might be ordered to be paid by the said now appellants Messrs. Overton and Hughes, as thereinafter prayed, after making due provision for the payment thereof to the said Messrs. Overton and Hughes or otherwise, as the said Court should consider proper, of such amount as should appear to be the balance of what was actually advanced and paid by the said annuitant Elizabeth Pratt, therein before mentioned, to or for the use of the said William Mitchell Bloye, deceased, as and for the consideration for the grant of such annuity, with such interest thereon as the said Court should consider proper."

\* 616 \* On the 5th of February, 1850, Messrs. Overton and Hughes likewise presented a petition to the Lord Chancellor, in which they recited the above facts, and the appeal to this House, and the petition presented to the Lord Chancellor on the 7th of January preceding, by Hillman and the other parties, and stated that such petition was set down for hearing before the Vice-Chancellor; but that there was a valid defence against the allegations thereof, and that at all events the petitioners (Overton and Hughes) were entitled to be paid out of the said fund the 900*l.*, with interest at five per cent. per annum, together with their costs relating to the indenture of the 27th November, 1846, and also incident to this and the other petition. They therefore prayed that this, their petition, might be heard along with that of Hillman and others, or that they might be directed to institute, within a limited time, a suit touching the matters alleged, and in default thereof, that the sum of 1770*l.* 1*s.* 9*d.* might be paid out of Court to the petitioner David Hughes. Or that in case the Court should make an order for the payment out of Court of any part of the said fund, then that Hillman and the others should give security for the repayment thereof; and that, also, in such case, the sum of 900*l.*, with interest from the 27th of November, 1846, until payment, at five per cent., and the costs of the petitioners relating to the indenture of the 27th November, 1846, and the costs of the petitioners relating to this application, and to the application of Hillman and the others, should be ordered to be paid to the said David Hughes out of the said fund.

*Mr. Stuart and Mr. Cairns*, for the appellants. — The order of the Lord Chancellor cannot be supported. He has exceeded the powers given him by the statute. He has declared the purchase itself void, and the deed made \* thereon invalid, and has ordered all the money taken out of Court to be paid back; but has left the parties to future litigation by bill as to other matters, if they shall so think fit. The money having been paid back into Court, the question whether the appellants are not liable to pay interest upon it during the time it was in their possession\* has also been left undecided; it has been reserved. This order is, therefore, not in conformity either with the authority given to the Court by the statute or with the principles or the practice of equity.

Every thing that was done here was fairly and regularly done by these appellants. There was a regular sale to Barker, and then an objection taken to the title, and Lake's refusal to complete the purchase for Barker was communicated to Mrs. Hillman. To avoid the expense of a suit for specific performance, Mr. Hughes "agreed to purchase the reversion on the joint account of himself and his partner."

[THE LORD CHANCELLOR. — With whom is that agreement stated to have been made?]

With Mrs. Hillman; for the affidavit of Hughes goes on to say that she, "under the advice of the said Henry Field, her solicitor as aforesaid, or of the said Daniel Levy, accepted such last-mentioned offer."

[THE LORD CHANCELLOR. — Where is there any proof of that statement?]

The affidavit shows that Hughes made the offer, and it is not unnatural to suppose that she accepted it. She had previously given her written assent to the sale for 900*l*. The cash account delivered to her shows that she knew she was dealing with these appellants. But the House is not asked to decide on the merits of the case, for they, in fact, are not before it.

[THE LORD CHANCELLOR. — Did Lewis execute any declaration of trust?]

\*No; for at the time of the execution of the deed of \*618 assignment, the purchase to Barker had not been rescinded; and as Overton and Hughes still hoped that that sale would be completed, it was wholly unnecessary to have such a declaration. On the sale being made to Lewis, the property was again offered to Barker. The assignment to Lewis is dated the 27th of November, and it was not until the 5th of December that Barker's purchase was formerly rescinded, and the deposit money claimed and returned. The transaction may appear singular, but it was *bond fide* on the part of Overton and Hughes, who, up to the last moment, made every effort to induce Barker to complete the purchase. It is clear that, under such circumstances, the order on Overton and Hughes to pay back the money, without any order as to their being reimbursed the purchase money, is bad in substance; and, being made only on a petition under the Trustee Act, where nothing but an order to pay money into Court or to pay it out of Court is authorised, it is also bad in form. The concession by the

appellants, that the case should be heard before the Vice-Chancellor as if upon petition and counter petition did not give the Court authority to make such an order. The appellants did not thereby submit the contract itself to the jurisdiction of the Court; and at all events, if the contract was displaced, it could only be displaced upon equitable terms. Upon the merits of the case, the order of the Vice-Chancellor ought to be affirmed. But if the House should think it a doubtful question whether, in strictness of law, the contract between these parties ought to be affirmed or disaffirmed, the parties ought to be at liberty to file a bill and cross bill, to bring that question regularly before the Court. That could not be done on a single bill to affirm; for then, if the contract could not be affirmed, the bill would be merely dismissed. There must be a cross bill to rescind an \*executed contract. *Richards v. Bayly*.<sup>1</sup> *Nash v. Flyn*.<sup>2</sup>

THE LORD CHANCELLOR. — You do not deny the jurisdiction of the Vice-Chancellor deciding in your favour, and allowing you to take the money out of Court; you cannot, therefore, deny the jurisdiction of the Lord Chancellor in refusing you leave to keep the money.]

But the Lord Chancellor's order goes much further than merely reversing that of the Vice-Chancellor. There was no declaration of the validity of the deed by the Vice-Chancellor. His order was within the limits settled by the statute. The Lord Chancellor has transgressed those limits in declaring the deed to be invalid.

[THE LORD CHANCELLOR. — It was impossible to give you the money without in substance affirming the validity of the deed. The Vice-Chancellor's decree is for the payment of the money; that is the performance of the purchase deed. Your best course now is to argue the question whether you took the purchase or not. If you are content so to argue it, we will decide.]

The appellant's counsel never could have consented to the Court deciding on the validity or invalidity of the purchase upon these affidavits, for they were mere voluntary affidavits. But even on the case which was before him on affidavits, the Lord Chancellor did not find fault with the price; his ground of decision was, that the relationship of Overton and Hughes to Mrs. Hillman, as her solicitors, prevented them from becoming the purchasers of this

<sup>1</sup> 1 Jones & La Touche, 120.

<sup>2</sup> 1 Jones & La Touche, 162.

reversion. The complaint here is, that he should so have held on a record not fitted to raise such a question. The Lord Chancellor had no jurisdiction to do this. He thought that<sup>1</sup> "the consent given includes in it the consent that the Court should make \*an order" adjudicating on the matter of right. That construction of the consent is denied; but even if correct, the order so made should, on principles of equity, have replaced the parties in the same situation in which they stood before the transaction. This has not been done.

[THE LORD CHANCELLOR. — But this was not insisted on at the hearing in the Court below. When you found the opinion of the Lord Chancellor was against you, you withdrew, and left him to make what order he thought fit. It is so stated in the report.<sup>2</sup>]

But before then the argument had been pressed on the Lord Chancellor, that the party claiming equity must do equity, and that the money paid on the purchase must be restored if the purchase should be set aside. The order of the Lord Chancellor either went too far, because it was beyond his jurisdiction to make any such order; or it did not go far enough, because it set aside the purchase without requiring the parties in whose favour it was made to do equity, by restoring the purchaser to the same situation in which he stood before the purchase was effected. On either of those grounds, the decree of the Court below is erroneous, and cannot be supported.

*Mr. Bethell* and *Mr. Rogers*, for the respondents, were not called on to address the House.

THE LORD CHANCELLOR. — My Lords, — I think that in this case it will not be necessary for your Lordships to call on the respondents' \*counsel. It is impossible to entertain \*621 any doubt on the merits of the case, or on the questions of form which have been submitted to your Lordships. The merits of the case lie in a very small compass. The property in ques-

<sup>1</sup> 1 Macnaghten & Gordon, 498.

<sup>2</sup> 1 Macnaghten & Gordon, 501. "A lengthened conversation then took place between the Lord Chancellor and Mr. Bethell (on behalf of Mrs. Hillman) relative to the terms of the proposed order upon the subject of setting aside the deed. Mr. Stuart, on behalf of Messrs. O. and H., declined to take any part in the matter, as he objected to the proposed order *in toto*."

tion was a reversionary interest in one-fifth part of the estate of Francis Bloye, which was to come to Mrs. Hillman, as the administratrix and widow of William Bloye, deceased, under the will of her first husband. Mrs. Hillman had married a second time. She was the wife of a man who was very ill at the time of this transaction, who was confined to his bed, and who was besides not able to read or write, and she was herself in a low condition of life, not able to employ any proper solicitor to assist her. She was occasionally assisted, it is true, by the clerk of an attorney, but not by any regular professional man.

The person to whom this property had originally belonged had granted an annuity of 42*l.* a year to Mrs. Pratt, which annuity ultimately became vested in a Mrs. Woodman. It was not for a very large sum ; the purchase money was only 600*l.* In the deed of annuity there was a power of sale, in case the annuity should fall into arrear. The interest, therefore, which Mrs. Hillman had in this property, bequeathed to her by her husband, was only the remainder of the fifth part of his share of Francis Bloye's property, after the payment of the annuity and repurchase of it, with interest and costs. The annuity fell into arrear, and a sale of the reversionary interest on which it was secured was proposed. Mrs. Hillman became alarmed at the expenses to which she might be put, and she offered to take a very moderate sum for her interest in the property on which this annuity was secured, if the parties entitled to sell, or whom she believed to be entitled to sell the property, would give her that sum. Her offer, however, was refused.

\* 622      \* Messrs. Overton and Hughes, the solicitors who were to manage this sale, were the solicitors of the annuitant, and not of Mrs. Hillman. The annuity being in arrear, it was determined to sell the property under the power of sale, and they set about the matter in a very regular way. I have nothing to find fault with them in the way in which they commenced the proceedings, though I have much to find fault with in regard to the manner in which they afterwards conducted themselves during these proceedings. The commencement was regular, and free from all objection. They proposed, under the power of sale, to sell this property, and they took steps for that purpose, and in doing so incurred considerable costs. Their own costs, which were charged, not to Mrs. Hillman, who did not employ them, but to Mrs. Wood-

man, the administratrix, who was their client, lessened the balance to be received from the purchase money when the sale should have been effected. At the sale itself, of which I must say something presently, a Mr. Barker became the purchaser of the property for the sum of 900*l*. It is sworn that the property was well worth 600*l*. or 700*l*. more, and would no doubt have fetched that larger sum if every thing relating to the title had at that time been perfect. That satisfies me that the sale afterwards made for 900*l*. was made at an undervalue, and that it would not have taken place except under the circumstances which existed in this case. Messrs. Overton and Hughes must early have been of opinion that there was a doubt in respect to their title to sell this property. The sale was advertised in a way which in itself very distinctly shows who was the person put forward as the seller, for I find in the 4th condition of sale these words: "4th. The vendor, who is the administrator of a person who was an annuitant, and is now selling under a power of sale contained in the annuity deed," &c.

\* The annuity deed was enrolled under the Act of Par- \* 623  
liament which I had the satisfaction to draw; and which contains provisions very much for the public advantage. That Act has a schedule of a very ample kind, and if the form of that schedule had been followed, this property would have retained its full value, and this mass of litigation would have been avoided. It is impossible, except by great neglect, to commit a mistake in respect of the forms of the Act of Parliament; but somebody or other had been neglectful. The persons guilty of the neglect contrived to mistake the terms of the Act, to register improper sums, to be otherwise neglectful, and in that way the annuity was not worth, as an annuity, and the power of sale it contained was not worth, as a power of sale, the parchment upon which they were written.

Messrs. Overton and Hughes must, at an early period of the business, have discovered something of this objection, for they applied to Mrs. Hillman, who was not a party to the sale, and as to whom the sale was made adversely, and they got from her an authority which, considering that she was without a regular professional adviser, they ought not to have attempted to obtain. So late as the 17th of November, the sale being then about to take place in a few days afterwards, they obtained from her a consent



to that sale. That consent is in these terms: [His Lordship read it.] Why should she consent to the sale at this sum? Why should her consent to sell at that sum be asked at all? If the annuity deed was valid, she was not entitled to refuse a sale because the property did not reach a certain sum. On the face of this consent, what does it amount to but a confirmation of that invalid title to sell, upon which they had pretended to put up the property for sale? They were bound to know, they must have

known, that the title to sell was invalid. Then they got a  
 \* 624 consent from this Mrs. \* Hillman, that she would take "the balance of the purchase money of the above-mentioned property, after payment of your and all other charges and expenses."

This is not all. After the sale she is called upon to make this declaration: "I, Ann Susanna Hillman, the wife of James Hillman, do solemnly and sincerely declare that I am the widow of William Mitchell Bloye, deceased, and that I am the wife of the said James Hillman, and that the said William Mitchell Bloye departed this life on the 4th day of June, 1840, and was buried at the parish church of Bethnal Green, in the county of Middlesex, and that the property comprised in such particulars of sale was sold by public auction for the sum of 900*l.*, and subsequently resold for the like sum of 900*l.*, and that the account hereunto annexed, marked with the letter B, has been examined by me, and that the same is, to the best of my belief, correct and right, and that the payments therein referred to were at my request." So that this woman, without the least professional advice to assist her, is asked, after the sale, to say that there had been a proper sale and resale of this property, and that what had been done was perfectly right; and then we find that the account, of which we have heard so much, is accepted by her as correct. It is said that this shows that she had received information of the real nature of the transaction, and that she knew that Overton and Hughes were the purchasers. How was she to know this? They were acting at this time as if they were her solicitors, the persons through whose hands the money was to reach her own; but, reaching their hands, payments were to be first of all made from it, and after those payments had been satisfied, the residue was to be handed over to her.

Now the probability is, that such a transaction as this was

never before seen in a Court of Equity. At that very \* time \* 625 the property was sold to Barker, and the sale to him was not rescinded ; so that if Mrs. Hillman was the seller of the property, it having been once sold to Barker, and that sale not having been rescinded, and then again sold to somebody else, she was left exposed to an action by Barker upon the original contract with him.

Can there be a more improper mode of conducting such a transaction ? I do not wish to give pain to any one, but I am forced to make these observations. Can any thing be more improper than reselling property whilst a previous contract for sale remains unrescinded, and selling that property as if it was unfettered and unbound by any previous stipulations ? What was the meaning of this transaction ? What was it for ? What was the purpose of the machinery thus brought into play ? I think I can see. As a lawyer I cannot shut my eyes to it. They found from Mr. Lake's letter that an objection existed to this annuity, and they knew that on account of that objection this sale itself was void, and that it could not be carried into execution by them as representing Mrs. Woodman. They therefore hit upon the expedient that has led to this litigation. They thought if they could get Mrs. Hillman, a poor, ignorant woman, without advice, whose husband was incapable of knowing any thing or assisting her in the matter, — they thought if they could get her to bring her title in aid of their own, they should be able to send this attestation of their authority to Mr. Barker, and induce him to accept the property as purchaser. That which is stated in this declaration is not worthy of the slightest notice. They had a deposit in hand upon the sale to Mr. Barker. At the moment when they obtained from her this declaration, they held in their own hands the deposit on the sale which had been unrescinded, and which, if Mr. Barker had thought fit to enforce against her, he could have enforced, and she must \* have paid every shilling of the costs. They \* 626 thought if they could get the property in this way out of Mrs. Hillman's hands into their own, that though the annuity itself might be void, they would be able to make a good title to the property. She was therefore sent for. The deed of assignment to Lewis was prepared. The deed was not read to her, — she was called on to execute it. What is that deed ? It is a regular deed of purchase by Lewis, who turns out to be Overton and Hughes's

clerk, and who advanced as much of the purchase money of that property as any of your Lordships did. He was put forward as the real purchaser. In that deed it is first stated that she contracted to sell, then that she sold, to Lewis. Both these statements are equally false. She is then made to admit the payment of the purchase money, and to give receipts for it. They then go to Mr. Lake, who represents Mr. Barker in the transaction; but before doing that, they are forced to again make use of Mrs. Hillman. She is made to prove the will of her husband in order to enable her to make good their title to the property through her. If their title to sell on behalf of Mrs. Woodman, the annuitant, had been good, which they assumed in the first notice of sale, it would not have been necessary for Mrs. Hillman to take out this probate; and thus unnecessary expenses were thrown on her, and on her only, though it was not for her interest that the property should be sold, and though she had no person to advise and assist her, and did not know what she was doing. Why were these expenses incurred? In order to make good their title to dispose of the property, to make a good title for the benefit of Overton and Hughes, who had then all the transaction in their own hands.

Your Lordships have been told that this was a fair transaction, and that the order made in the Court below was a harsh \*627 order. With that order I entirely concur. I \*agree that the deed is invalid, that it is not worth the ink with which it is written. These parties knew it to be invalid, and their conduct showed that they did so. Their conduct throughout was a scheme to make Mrs. Hillman concur in the sale of the property at all events, so as to avoid the effects of the original blunder in the enrolment of the annuity deed. Suppose Barker had brought an action on his contract, in what situation would those parties have been placed? They would have been liable to him.

Then it is said that what Mrs. Hillman did, she did with full notice. I have read these papers, my Lords, with some care, and I cannot see that she had any notice to inform her of what she was really required to do. I cannot see that she had any such notice as equity considers necessary in cases of this kind, regard being had to the situation in which she stood. She was sent for to Overton and Hughes's office. She was without an attorney. She did not know what she was about. She was required to sign a very important deed. She had, however, some notion that there

was something irregular, and she asked about the purchase. Your Lordships are aware that she already knew that there had been a sale, and that that sale was not completed, and that there had been a resale ; she asked who was the purchaser. What was the answer to her inquiry ? Hughes did not say to her that Barker could be forced to complete the sale, or that the sale to him was perfect ; but Hughes said that difficulties arose in transactions of this kind, “ That on sales of reversionary property there nearly always were objections or difficulties ; but that the title in this instance was as good as could usually be given to that kind of property ; and that the reversion was still for sale to any one who chose to give 900*l.* for it, or words to that effect.”

Now, my Lords, Mr. Hughes, who gave her all this \* information, was bound to tell the truth ; he was bound \* 628 to tell her that he and his partner were the purchasers ; and had become so as a mere channel to enable them to sell to Barker. He did not do this ; but when Hughes had thus, as he thought, got rid of the difficulty, he again applied to Lake, who, however, said he would not look at the title. Why not ? It was as good a title, as a legal title, as any man could have ; but it was obtained from Mrs. Hillman without sufficient knowledge on her part, and therefore Mr. Barker himself, if he had afterwards become the purchaser, would not have been safe in equity.

We are told that Mr. Hughes was surprised, that he laboured under a difficulty, that he had not proper means of laying evidence before the Court, and that there ought to have been a bill filed. Why did not he file a bill ? He presented a petition ; and upon what did he support his petition ? Upon his own affidavit. Was there any restriction upon what he had to say ? None. He said what he liked. Is not he competent to state his own case ? Perfectly so ; but his case did not bear stating. That is the only reason why upon the affidavit you find so much ambiguity. It was not the power of stating that he wanted, but it was caution on his part not to state the case. What does he state in his affidavit ? “ That apprehending the purchase would go off, Messrs. Overton and Hughes, to do an act of kindness and benevolence to Mrs. Hillman, agreed to take the property.” But the power to do this they did not possess. There was no contract. To a contract there must be two persons. Two minds are essential to constitute a contract. For a contract of this sort, there must be not only

a buyer but a seller ; and upon this occasion there was a buyer, no doubt, in one sense of the term, but there was no seller. Contract, my Lords, there was none ; but contrivance there was, in order to obtain a good title from this woman, so as to give

\* 629 \* validity to the acts that had taken place to enable these parties to complete the sale of the property.

I should not have thought so ill as I do of this case, indeed I should have thought there was some excuse, if, when the transaction had miscarried, when the purchaser had said, "I shall not take this title," Hughes had said to Mrs. Hillman : "We have tried to make a good title ; the object has failed ; here is your property, if you like to take it." But instead of that, finding that the property was of more value than the sum paid for it, they have insisted upon their own title as purchasers : they have adopted the course stated in order to obtain from this woman the realization of that alleged contract, which, as I have shown your Lordships, was in truth no contract at all.

It would be useless to go through any more of these facts. I have looked into every item of every account, and every fact tells stronger and stronger against the case of Overton and Hughes. It shows the manner in which they were dealing with Mrs. Hillman to get her assent to a transaction she did not understand. It is said that Mr. Hillman must have sanctioned this proceeding. But he is a poor man, lying on his bed, and utterly incapable of writing or reading ; and the attorney's clerk takes the deed to him, and obtains his signature without attempting to read to him a single word of that deed. The deed was executed by Hillman and his wife without their having heard a single word of it read to them, and without their knowing a single syllable of its contents.

I have been surprised, I confess, at this matter being pursued, when the rules of equity are so clear. No man in a Court of Equity is allowed himself to buy and sell the same property. He cannot sell to himself. Even in the case of a fair trustee,

\* 630 he cannot sell to himself. If he has the \* power or the trust to sell, he must have some one to deal with. Courts of Equity do not allow a man to assume the double character of seller and purchaser ; and it is necessary, in order to preserve the interests of persons entitled beneficially to property, to maintain that rule. But here is a case which goes infinitely beyond that. I should lay it down as a rule, my Lords, that ought never to be de-

parted from, that if an attorney or agent can show he is entitled to purchase, yet, if instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fact, no such purchase as that can stand for a single moment. Such a transaction, to stand, must be open and fair, and free from all objection. And if a man purchases, as these appellants purchased, by putting forward a clerk of his own, not as a clerk, not as an agent, but as an actual *bonâ fide* purchaser upon an absolute and independent contract, he does that which, the moment it is stated, renders the deed powerless for the purpose for which it was framed and executed ; and the Court will hold the parties responsible for every thing that results from it. If, therefore, a bill had been filed, and this contract had been attempted to be set up, and it had come before your Lordships, I cannot hesitate to say that you would have rescinded that contract, and thrown the whole costs of the proceeding upon the parties who had entered into it.

My Lords, without further travelling into this portion of the case, for it really admits of no doubt, — the further it is investigated the more open to objection it proves, — I come to another part of it. What is the objection in point of law ? It is that this decision was made on a petition under the statute, and not on a bill. The Act of Parliament (10 & 11 Vict. c. 96) was passed for a very good object, — whether it is free from all objections or not is not now the question. You have to execute the laws here precisely as you would \* do if sitting in any Court of original \* 631 jurisdiction. Your Lordships are sitting as a Court of Equity, and you must deal with this case just as the Court of Equity ought to have done. The Vice-Chancellor of England was led to believe, upon the affidavits, that this was a real transaction of sale, and ought to be supported. The money had been paid into Court under the provisions of that Act of Parliament which enables trustees who have money in hand to pay it into Court, and then enables the Court to deal with the money as between the persons clearly entitled. The Vice-Chancellor made an order giving Messrs. Overton and Hughes the whole of the money produced by that sale of the property. The result of that was, that they had that money for some time in their hands. There was then an appeal to the Lord Chancellor, and a reversal of that decision ; and the Lord Chancellor very properly ordered the money to be paid back. He then declared, and properly declared, that the deed in

question was a deed that could not stand. Upon that, no Judge in equity ought to have entertained a doubt. Then he reserved the question of interest payable upon that money during the period it was in the hands of Overton and Hughes, and on that point he left the parties at liberty to apply to the Court.

A very grave question was raised at your Lordships' bar in regard to the injustice committed upon Messrs. Overton and Hughes by this order. In the first place, it was said there is no jurisdiction. I was surprised to hear that statement, because the Act of Parliament is express that the Court may make the same order upon an application by petition, with the right to rehear, and subject to an appeal, as if a regular bill had been filed; but reserving to the Court itself, if it should think it necessary, to direct a bill to be filed, and the matter to be solemnly argued. That

is entirely at the discretion of the Court. The Act of \* 632 \* Parliament gives the same jurisdiction to the Lord Chancellor upon that petition as if a bill was actually filed. I should have very much doubted whether it was necessary in such a case as this to present a cross petition; but there is not a question as to the power of rescinding a deed where a petition and cross petition have been presented, for upon the Act of Parliament how else can any one be declared entitled to the money? One person applies for the money in virtue of a supposed title to it, the other denies that title. You cannot order the money to be paid if the jurisdiction to deal with the title does not exist. It is clear, that on a petition and cross petition an order of this kind could be made. Is a cross petition necessary? If it is, that necessity was here dispensed with, for a consent was given on the part of Overton and Hughes that the case should be considered just as if there had been a cross petition presented by the respondents. Then where is the want of jurisdiction? Can any thing be more clear than that there was perfect jurisdiction, just as good jurisdiction as if a bill had been filed by Overton and Hughes in order to receive the money under this deed, and a cross bill had been filed in order to set aside the deed itself.

Then, my Lords, it is said, "If there was jurisdiction, we have not had justice done; at all events, we are entitled to the money we have paid, and the order of the Lord Chancellor has not provided for that." So they are, beyond all doubt, entitled to some of it. For example, to the purchase money of the annuity, which

might be recovered back in an action, or which might be deducted from the money they received out of Court, if that money was still in their hands. That was very strongly put by Mr. Stuart, and I am much impressed with his view of the case. It is, however, quite clear that, at the hearing in the Court below, the parties did not submit themselves to the order of the Court, \* asking to have that money back to which alone they were \* 633 entitled, because they were so displeased with the decision, as often happens in such cases, that they did not like to take the alternative view of the subject, to receive back that to which, if the sale was successfully impeached, they would be entitled. But I cannot doubt that, if the Lord Chancellor, in the Court below, had been asked to give them that which they were clearly entitled to, it would have been given to them as a matter of course. His Lordship, by his order, reserved the question of interest, and has given to each party the liberty to apply. He has given them the liberty to apply for what? For the fund, according to their interest in it. No doubt they cannot apply under that order for the money, as upon the validity of the contract, which is condemned by the order itself; but submitting to the order (that is, to that portion of the order which declares the contract a nullity), they want no order of your Lordships in this House. They have only to go before the Court, and apply for that to which they are entitled. The order of the Court below expressly reserves to them that liberty; but I advise your Lordships, as I would in all these cases, if it can be done without great inconvenience, at once, as far as you can, to put an end to contention, and if possible to arrange the terms upon which the case is finally to stand. I shall take the liberty of moving that this appeal be dismissed, with costs. But, notwithstanding that, I am prepared to advise your Lordships to wind up the matter, if you can, and to state why. But I wish first to know whether the parties desire it to be so.

*Mr. Stuart.* — Certainly, my Lord.

*Mr. Bethell.* — Certainly, so far as we are concerned. There were certain petitions standing over; the whole matter may now be arranged subject to the costs upon those petitions.

\* THE LORD CHANCELLOR. — Their Lordships do not know \* 634 what the contents of those petitions are.

*Mr. Bethell.* — They were petitions presented by us, after payment to Overton and Hughes of the redemption money, and inter-



est on that redemption money, and their costs and charges ; and charging them with interest upon the money taken out of Court during the time that it was in their hands.

THE LORD CHANCELLOR. — Will you read to me, Mr. Bethell, the prayer of one of those petitions presented to the Court below, and the costs of which await the present order of this House.

*Mr. Bethell.* — There are two petitions, one by us and one by Overton and Hughes. (He referred to them, see ante, pp. 615, 616.)

THE LORD CHANCELLOR. — You are going now into that which the House will not deal with. The question is, whether you are content to leave the matter to the decision of the House, so as to prevent all further litigation as regards the interest of the fund they took out ; to pay back the 600*l.* and the interest paid. I must say, decidedly, that some of those costs ought not to be allowed ; nor can they be recovered ; such as those that were incurred in making out Mrs. Hillman's title. It is impossible, with the decree which their Lordships will pronounce, that those costs can be allowed. If 10*l.* were struck off the costs paid in this account B., and the 600*l.* were to be taken as the purchase money with the interest paid, and those charges in this account were paid, minus the 10*l.*, that would meet the justice of the case. I will therefore move your Lordships, that Messrs. Overton and Hughes be paid, out of the money in Court, the 600*l.* paid for the redemption of the annuity, and the sum paid by them as interest, and the charges in account B. minus 10*l.* Then I must  
 \* 635 advise \* your Lordships to charge Messrs. Overton and Hughes with interest at 4 per cent. for the money taken by them out of Court during the period they had it in their possession.

*Mr. Stuart.* — Does your Lordship mean that interest should be given upon the 600*l.* from the date of payment ?

THE LORD CHANCELLOR. — You must have the interest while the fund made interest.

*Mr. Stuart.* — And we pay interest while the fund was in our possession under the order of Court ; interest upon that at 4 per cent.

THE LORD CHANCELLOR. — The same interest as while the fund was producing interest.

*Mr. Stuart.* — It is five per cent. upon the 600*l.*

THE LORD CHANCELLOR. — No ; you cannot have that. It is at the same amount as you have received.

*Order complained of affirmed, with variations and with costs.*

An Order, of which the following are the material parts, was afterwards entered on the Journals :—

That the appeal be dismissed, and that the order of the Court of Chancery, of the 10th of November, 1849, therein complained of, be affirmed ; and that the appellants do pay to the respondents the costs incurred in respect of the appeal ; and with respect to two petitions in the matter aforesaid, presented, subsequently to the said order, to the Court of Chancery by the appellants and respondents respectively, and which are now pending in the said Court, it is hereby further ordered, that all further prosecution on the said two petitions be stayed ; and that with respect to the fund in the Court of Chancery, being 1827l. 3s. 9d. 3 per cent. Consolidated Bank Annuities, standing in the name of the Accountant-General to the credit of, "In the Matter of the Trusts of Bloye's Estate, the Share of William Mitchell Bloye," being the fund produced by the sum of 1770l. 1s. 9d. cash, there be paid to the appellant David Hughes the several sums next hereinafter mentioned, — the sum of 600l. paid for the redemption of the annuity of 42l. granted to Elizabeth Pratt by \* William Mitchell Bloye ; \* 636 the sum of 79l. 10s., interest thereon up to the 6th December, 1846 ; the sum of 120l. 11s. 6d. paid by Overton and Hughes to Ann Susannah Hillman ; the sum of 53l., being the amount of the auctioneers, Messrs. Turner and Atherton's, charges in respect of the sale of the reversionary interest of Ann Susannah Hillman, in the original petition mentioned ; the sum of 2l. 7s., being the charges of Mr. Sewell in respect of the sale ; the sum of 9l. 11s. 6d., being the charges of Messrs. Tebbs, the proctors for the probate granted to Ann Susannah Hillman of the will of William Mitchell Bloye, deceased ; all which said several sums amount to the sum of 865l. ; and it is further ordered, that out of the sum of 35l. in the original petition mentioned, charged by the appellants Overton and Hughes to Ann Susannah Hillman as professional charges, there be deducted the sum of 10l., and that the remaining 25l. be paid to David Hughes out of the fund in the Court of Chancery ; and that there be also paid to David Hughes out of the fund in Court the sum of 12l. 5s. 1d., being the taxed costs of James Trundle and Machin Lake, ordered to be paid to their solicitor by the order of the Vice-Chancellor of the 2d March, 1849, but which costs have in fact been paid to such solicitor by Overton and Hughes out of their own funds : and with respect to the interest to be allowed to Hughes, it is ordered that Hughes be charged with interest on the sum of 1757l. 16s. 8d. for the interval between the same having been paid out of Court to Hughes by the order of the Vice-Chancellor of the 2d March, 1849, and its having been repaid by Overton and Hughes into Court under the order of the 10th November, 1849, hereby affirmed, that is to say, from the 23d March, 1849, until the 19th December, 1849, being 271 days, and that the rate of interest be the same which has been produced by the 1770l. 1s. 9d. so invested in the purchase of the 3 per cent. Cons. Bank Annuities, that is to say,

8*l.* 2*s.* per centum per annum; and that Hughes be allowed interest at the same rate on the sum of 865*l.* for such time as the sum of 1757*l.* 16*s.* 8*d.* shall have borne interest, that is to say, for the said interval of 271 days, and also from the time at which the sum of 1770*l.* 1*s.* 9*d.* was invested in the 3 per cent. Cons. Bank Annuities until the sum of 865*l.* shall be paid thereout to Hughes, as herein directed; and that the difference of the interest hereby allowed to Hughes be paid to him out of the fund in Court: and it is ordered, that so much of

\* 637 the 1827*l.* 3*s.* 9*d.* 3 per cent. Cons. \* Bank Annuities as shall be sufficient to raise the sums of 865*l.*, and 25*l.*, and 12*l.* 5*s.* 1*d.*, and the difference of interest hereby ordered to be paid to Hughes, be sold, and the sums so raised be paid to him accordingly: that the residue of the Bank Annuities, and any dividends on the same until sale, and on the residue thereof until transfer, be transferred to Ann Susannah Hillman, as executrix of William Mitchell Bloye: and that upon payment to Hughes of the hereinbefore-mentioned sums of 865*l.*, 25*l.*, and 12*l.* 5*s.* 1*d.*, and the difference of interest, the appellants do deliver up to Ann Susannah Hillman, as such executrix as aforesaid, the annuity deed of the 6th of April, 1840, and the assignment to William Lewis, of the 27th of November, 1846, the probate of the will of William Mitchell Bloye, and the indenture of mortgage of the 3d of June, 1839, in the original petition mentioned; and that the appellants do cause satisfaction to be entered on the roll of the judgment signed on the warrant of attorney given collaterally with the annuity deed hereinbefore mentioned, the respondents, by their solicitor Mr. Lake, undertaking to pay the costs out of pocket occasioned to the appellants thereby: and it is further ordered that, with this judgment, the matter be remitted back to the Court of Chancery, to do therein as shall be just and necessary for giving full effect to this judgment. — Lords' Journals for 1852, 25th March, p. 66.

1851. February 18, 20; July 9. 1852. June 16.

GEORGE STEPHENSON, *Plaintiff in error.*

HENRY THEOPHILUS HIGGINSON, *Defendant in error.*

*Ecclesiastical Court. Proctor. Registrar. Evidence. Practice. Statute, Construction of.*

In construing an ordinary Act of Parliament, every word must be understood according to its legal meaning, unless the context shows that the legislature has used it in a popular or more enlarged sense: but in a penal enactment, where it is sought to depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood in a larger or more popular sense must plainly appear.

The 54 Geo. III. c. 68, § 9, prohibits a proctor from permitting or suffering "his

name to be in any manner used in any suit, the prosecution or defence of which shall appertain to the office of a proctor, or in obtaining probates of will, letters of administration, or marriage licenses" for the benefit of any other person. The 10th section enacts, "that in case any person shall, in his own name, or in the name of any other person, make, do, act, exercise, or perform any act, matter, or thing whatsoever, in any way appertaining or belonging to the office, function, or practice of a proctor, for or in consideration of any gain, fee, or reward, or with a view to participate in the benefit to be derived from the office, function, or practice of a proctor, without being admitted and enrolled, he shall forfeit 50*l.*":—

*Held*, that, construing these two sections together, the acts intended by the latter section to be prohibited were those which were legally incident to the office of a proctor; not those which, though usually performed by him, were not of right incident to his office.

And, therefore, that a registrar of an Ecclesiastical Court, who, in cases where there was no testamentary contest, had prepared the documents, and done the acts necessary, for obtaining letters testamentary, and probates of wills, and other similar matters, had not thereby subjected himself to the penalty imposed by the 10th section.

On the trial of an action brought on this statute, evidence from certain Ecclesiastical Courts was tendered, to show that it was customary for the registrar to do these acts, and to receive fees on account of doing them:—

*Held*, that such evidence was properly admitted.

\* The Lords allowed the opinion of a learned Judge, who had been present at the hearing of the cause, but who was unable to attend when the Judges' opinions were delivered, to be read by one of his brethren; but it was expressly declared that this could not be done as a matter of course. \* 639

THIS was an action of debt, for penalties under the 54 Geo. III. c. 68.<sup>1</sup>

<sup>1</sup> 54 Geo. III. c. 68. "An Act for the better Regulation of the Ecclesiastical Courts in Ireland, and for the more easy Recovery of Church-Rates and Tithes." By the 9th section it is enacted, "That if any proctor of his Majesty's Court of Prerogative in Ireland, or of the Consistorial and Metropolitan Courts of Armagh and Dublin, or of any other Ecclesiastical Court or Courts in Ireland, in which he shall be entitled to act as a proctor, shall act as such, or permit and suffer his name to be in any manner used in any suit, the prosecution or defence whereof shall appertain to the office of a proctor, or in obtaining probates of wills, letters of administration, or marriage licenses, to, for, or on account, or for the profit and benefit of any person or persons not entitled to act as a proctor, or shall permit or suffer any such person or persons to demand or participate in such profit and benefit, and complaint thereof shall be made to the Court or Courts wherein such proctor hath been admitted and enrolled, and proof given to the satisfaction of the said Court or Courts that such proctor hath offended therein as aforesaid, then and in such case every such proctor so offending shall be struck off the rolls of proctors, and be for ever disabled from practising as a proctor, or be suspended from the office, functions, and practice of a proctor, in all and every of the said

\* 640     \* George Stephenson was a proctor of the Ecclesiastical Court of the Bishop of Down and Connor, and Henry Theophilus Higginson was registrar of the diocese of Down and Connor, but was not a proctor of the Ecclesiastical Court there, or of any other Ecclesiastical Court in Ireland.

Higginson, while such registrar, had been in the habit of extracting probates on wills where there was no testamentary contest, and of drawing up and engrossing affidavits to verify the same, and of performing various other acts relating to the obtaining and procuring letters testamentary, which belonged, as Stephenson alleged, to the office and practice of a proctor. He has also been in the habit of making charges for the performance of these acts, in addition to the fees to which he was entitled as registrar.

The first count of the declaration stated that the defendant, on the 4th of April, 1844, did, in his own name, in the Consistorial

Court of the Bishop of Down and Connor, the said Court \* 641 being one in which proctors had \* been accustomedly admitted, and had practised, for and in consideration of a certain fee, to wit, 10*l.*, make, do, exercise, and perform a certain act, matter, and thing appertaining to the office, function, and practice of a proctor; that is to say, by the defendant in the said

Court or Courts for so long a period as the Judge or Judges of the said Court or Courts may deem fit; save and except as to any allowance or allowances, sum or sums of money that are or shall be agreed to be made to the widows or children of any deceased proctor or proctors, by any surviving partner or partners of any such deceased proctor or proctors; and also save and except as to any agreement made, or understood to have been made, between proctors and articulated clerks whose articles have been executed prior to the passing of this Act." By section 10 it is enacted, "That in case any person or persons shall, in his or their own name, or in the name of any other person or persons, make, do, act, exercise, or perform any act, matter, or thing whatsoever, in any way appertaining or belonging to the office, function, or practice of a proctor, for or in consideration of any gain, fee, or reward, or with a view to participate in the benefit to be derived from the office, function, or practice of a proctor, without being admitted and enrolled, every such person for every such offence shall forfeit and pay the sum of 50*l.*, to be sued for and recovered in manner hereinafter mentioned."

The 11th section provides that the enactments of the statute shall not extend to the salary of a clerk *bonâ fide* serving in the office of a proctor.

The 12th section allows the action to be brought in any of the Superior Courts of Law in Dublin, and the 13th section requires it to be brought within three calendar months after the act committed, and allows the defendant the benefit of the plea of the general issue.

Ecclesiastical Court obtaining and procuring letters testamentary, to wit, probate of the last will and testament of one Euphemia Thompson, deceased, to be granted forth of the said Court, by the Bishop of Down and Connor and the defendant, for the purpose of obtaining and procuring the said letters testamentary, in and forth of the said Ecclesiastical Court, extracting probate of the said will, and in the matter of the goods and chattels of the said Euphemia Thompson in the said Court, preparing and drawing the inventory of the goods and chattels of the said Euphemia Thompson, deceased, and the schedule of the said goods and chattels, and the affidavit to verify the said schedule, and the certificate thereto annexed, he, the defendant, then not being or having been admitted or enrolled a proctor of the said Ecclesiastical Court, or of any other Ecclesiastical Court in Ireland, or in any manner admitted or enrolled a proctor within the meaning of the Statute 54 Geo. III. c. 68, contrary to and against the form of the said statute. There were a great many other counts, varying the statement of the alleged offence. The defendant pleaded, according to the privilege given him by the statute, the general issue, that he did not owe, &c.

The cause was tried at Carrickfergus, on the 21st July, 1845, before Mr. Justice Perrin, when it appeared that the acts complained of were done by the defendant, who was the registrar of the Consistorial Court of Down and Connor, or in his office, and that the costs were furnished by, and paid to him, or his deputy, and that there was no contest about any of the wills mentioned in the declaration.

\* It also appeared that there were several proctors practising in the said Court, and that the defendant had never been admitted or enrolled as a proctor. \* 642

The plaintiff having closed his case, the defendant produced witnesses from the Ecclesiastical Courts of Dublin and Chester to prove a custom for the registrar to do these acts, and to receive fees on account of them, in addition to his official fees.<sup>1</sup>

<sup>1</sup> The result of the whole of the evidence given in the cause was thus stated by Mr. Justice Crampton, in his judgment (9 Irish Law Reports, p. 484): "The material facts are these: first, the defendant is not a proctor of the Ecclesiastical Court of Down and Connor, or of any other Court; and there are proctors of that Court; secondly, the defendant is the registrar of the Consistorial Court of Down and Connor; thirdly, the defendant did, for fee and reward, do the acts, and perform the services stated in the declaration and bill of exceptions,

And thereupon the counsel for the plaintiff excepted to the charge.

The jury found a verdict for the defendant, in accordance with the direction of the Judge.

On the 15th of April, 1846, judgment was entered for  
 \* 643 \* the defendant, by the Court of Exchequer overruling the exceptions.

On the 12th of May, 1846, the plaintiff brought a writ of error in the Court of Exchequer Chamber in Ireland. There the judgment was affirmed by a majority of seven Judges to four.<sup>1</sup> This was a writ of error on that judgment. Barons Parke and Alderson, Justices Patteson, Coleridge, Maule, Wightman, Erle, Williams, and Talfourd, and Baron Martin attended the argument.

*Mr. Napier* and *Mr. Unthank* for the plaintiff in error. — The question here raised relates to the right of the defendant to take fees for extracting probate, and doing other similar acts as the private agent of parties. The defendant insists that the acts which he is charged with having performed, though they are ordinarily the acts of a proctor in the discharge of his duty, are not acts exclusively to be performed by proctors, and do not, as such, “appertain to the office of a proctor,” within the meaning of the statute. On the other hand, the plaintiff maintains that it is not necessary for him to show that these acts are such as must be performed exclusively by proctors, but that they fall within the provisions of the statute if they are acts ordinarily done by proctors, and are performed “for gain, fee, or reward” by persons not admitted and enrolled as such. They are undoubtedly acts of this kind,—acts properly and ordinarily performed by proctors;

viz. in obtaining probates of wills and administrations from the Court, in preparing and drawing inventories, schedules, and affidavits for the parties, in preparing and drawing renunciations of probate, bonds, &c., and also fiats for commissions to swear executors and administrators in the country, and affidavits or commissions; fourthly, it is admitted that these are all acts which proctors, *qua* proctors, are entitled to perform for their clients, and for which they are entitled to charge certain fees, and are acts most usually performed by proctors; fifthly, it is admitted that none but proctors can, for fee or reward, perform such services for others, unless the registrar be also entitled so to do; and sixthly, the defendant, in his bill of costs, specified in the bill of exceptions, claims to be paid for the services in question, in addition to, and distinctly from, the fees which he claimed and was paid as registrar.”

<sup>1</sup> 9 Irish Law Rep. 458.

and the evidence given on the part of the defendant shows that they are performed for fee, gain, or reward.

The case is equally clear on the construction of the statute. The 9th and 10th sections of the statute must be read together; and so read, they show that there is no \*ground for \* 644 the distinction which will be set up by the other side between a voluntary and a contentious proceeding. It is quite clear that, whether a proceeding is contentious or not, a solicitor could not do these acts with reference to it, nor can a registrar do them. They are acts which plainly belong to the office, function, and practice of a proctor; and if so, the Act forbids them to be done except by a proctor. The statute fixes a penalty on the proctor who shall allow an unqualified person to do these acts in his name. Surely, it is a very strange thing for the statute to do this, and yet allow any unqualified person to do these very acts in his own name, without subjecting him to any penalty whatever.

The law intended to establish a marked distinction between the office of a proctor and that of a registrar. The fees of the latter are fixed by statute; not so those of the former. Thus, the 38 Geo. III. c. 39 (Irish), provides that no proctor shall sue for or recover his bill of fees and charges till one month after the delivery of such bill, and that the bill is to be delivered to the registrar of the Court. Now it is clear that the legislature never could have intended the registrar to be the taxing master of his own bill of charges; and as it is his duty, as the officer of the Court, to tax the proctor's bill, that of itself excludes him from performing the proctor's business.

The 9th section affords no warrant for the argument that the character of proctor is to be limited to a contentious suit. The same rule must be applied to the proctor as to the attorney. Both alike are liable to the supervision of the Court in their conduct, whether a suit is in existence or not. Blackstone expressly puts them into the same category, for he says:<sup>1</sup> "An attorney at law answers to the procurator or proctor of the civil-ians and canonists"; and \* he adds, "That no man can \* 645 practise as an attorney but such as is admitted and sworn." The ecclesiastical authorities put proctors in the like manner upon the footing of attorneys. *Prankard v. Deacle*,<sup>2</sup> and

<sup>1</sup> 3 Comm. 25.

<sup>2</sup> 1 Hagg. Eccl. 169, 186.



*Collett v. Collett*.<sup>1</sup> In the case of *The Lady Hatton Finch*,<sup>2</sup> a proctor's bill was referred for taxation to the registrar upon a complaint of extortion, and the reference was made to the registrar in the exercise of the ordinary power of the Court. The registrar would be an unfit person to whom to refer such a matter, if he himself acted as a proctor; and the reference being in the exercise of the ordinary jurisdiction of the Court, shows that the supervision of the bills of proctors is part of his ordinary duty. Ayliffe's Parergon<sup>3</sup> and the Irish Canons<sup>4</sup> show that, though the registrar ought to be a person qualified for office as having been first admitted as a notary, the duties of the two offices are entirely distinct from each other. The case of *Neale v. Rowse*<sup>5</sup> establishes that the officers of the Court are, under the Statute 21 Hen. VIII. c. 5, prohibited from taking fees for work done in Court, when other persons may take them; and that statute, which has thus received a judicial interpretation in this country, is the model on which the Irish Statute 28 Hen. VIII. c. 18, was drawn, both being passed for the purpose of regulating the fees to be taken on probates of wills in the Ecclesiastical Courts.

If the plaintiff is right in his construction of the Act, the question of the admissibility of the evidence of custom raises no difficulty whatever, for then it is clear that no evidence of a custom in the Court can control or restrict the clear words of a statute.

Supposing, however, that the evidence was admissible, it \* 646 does not warrant the direction \* of the Judge to the jury that it did not appear that the acts done by the defendant were acts exclusively to be performed by a proctor. In the first place, the evidence only goes back to a period of from twenty to twenty-five years; and in the next, it only establishes a practice in particular Courts, but not over the whole even of any one diocese. So that, independently of the principle that no custom of the Courts can be admitted in contravention of the words of a statute, the evidence of custom is itself insufficient to make out this defence. But the evidence ought not to have been received. The criterion of exclusion is the quality of the act performed, and not the character of the person who performs it. *The Dock Company of Kingston-upon-Hull v. Browne*.<sup>6</sup> The construction of a statute

<sup>1</sup> 3 Curteis, 726, 735.

<sup>2</sup> 3 Hagg. Eccl. 255.

<sup>3</sup> 382.

<sup>4</sup> 78-82.

<sup>5</sup> 13 Rep. 24, 4 Inst. 336.

<sup>6</sup> 2 Barnewall & Adolphus, 43.

is not to be gathered from particular expressions in the statute, especially if they are of a doubtful kind, but from the general intendment of the statute, and the ordinary law of the country, as explained in a judgment in this House in *Auchterarder v. Kinnoull*.<sup>1</sup>

The plain question on the statute is, whether the acts alleged in the declaration to have been performed by the defendant are not acts which belong and appertain to the duty of a proctor? If they are, they cannot be lawfully performed by any person who does not hold that character.

*Mr. Rolt* and *Mr. Fleming*, for the defendant in error. — The substantial question in this case is, whether, in discharge of any obligation cast by law upon the subject, he is compellable at all times to employ a proctor as his agent. The plaintiff maintains the affirmative of that proposition; but he cannot maintain it successfully, unless he can show that the words of the statute plainly create that compulsion. There are no words in this statute which can be so \* construed. It cannot be affirmed that \* 647 all the business which is usually performed in the office of a proctor necessarily appertains to his office.

[*LORD BROUGHAM*. — Just in the same way as it cannot be affirmed that receiving dividends on stock necessarily appertains to the business of a solicitor; yet clients often employ him to receive them.]

Here the real responsibility of granting probate rests with the Judge; the steps necessary to obtain it are those which the party himself may perform without any agent, or which any agent may perform for him. *Fullerton v. Dixon*.<sup>2</sup> There is no act necessary to be done in order to obtain probate which is not described by the text-writers as among the acts to be performed by the registrar of the Court. *Ayliffe*<sup>3</sup> calls him indifferently “scribe, notary, or registrar”; and then states his duties, which include every act now set forth by the plaintiff as peculiarly appertaining to the office of a proctor, from the performance of which it is now said that the registrar is excluded. The Irish Act 28 Hen. VIII. c. 18, which settles the fees, mentions the making of inventories, making schedules and affidavits.

The case of *Neale v. Rowse*<sup>4</sup> was a case of extortion, and does

<sup>1</sup> 6 Clark & Finnelly, 658.

<sup>2</sup> Parergon, p. 382.

<sup>3</sup> 4 Hagg. Eccl. 402.

<sup>4</sup> 13 Rep. 24, 4 Inst. 336.

not at all show that the registrar ought not to do the work, but merely that there he had charged too much for it; which implies that there was no legal objection to his doing it.

It is clear that, in any case where there is no contentious litigation, the registrar may act, and the proctor is not necessarily required. Domat<sup>1</sup> shows that a proctor is the representative of a

party in a contentious litigation, and that he must be authorised to appear and act by a \* proxy being given him,

and he is called "procurator, an officer bound to institute proceedings"; but he does not extend this obligation to employ a

proctor to cases where no contentious obligation exists. In like

manner Dr. Cowel thus<sup>2</sup> describes him: "Proctor is he who

undertakes to manage another man's cause in any Court of the

civil law, or ecclesiastical, for his fee. *Qui aliena negotia gerenda*

*suscipit.*" And Cunningham, Jacob, and Tomlinson adopt this

description. Pothier<sup>3</sup> is to the same effect; so is Burn.<sup>4</sup> The

object of the Act is plain. That object was not to prevent proctors

from keeping a clerk who was not an admitted proctor, though

of course, if the plaintiff's contention is right, he would be a person

within the very description of the statute; namely, a person

who, not being a proctor, was doing acts in the name of the proctor,

for fee or reward: the object was a different one. It was to

prevent persons who were not admitted as proctors from representing

themselves as proctors, doing what was properly the work

of proctors, and taking the fees of proctors for it. Some proctors,

for instance, would allow portions of their profits to solicitors who

acted in their names, and thus represented themselves as proctors.

The Act intended to strike at that practice, and also, perhaps, to

prevent the practice of proctors paying their clerks by a share of

the profits. This latter practice was intended to be prevented for

the future. It must have existed prior to the statute, for the last

portion of the 9th section expressly refers to that state of things,

and excludes from its operation agreements of that sort previously

made with clerks, who were perhaps paid during the last period of

service by a participation in the profits. Two descriptions

\* 649 \* of things were forbidden by the statute. The first was,

<sup>1</sup> Civil Law, Vol. I. bk. i. tit. 15; Vol. II. bk. ii. tit. 5, s. 2.

<sup>2</sup> Dict. tit. Proctor.

<sup>3</sup> Vol. IV. c. 5, 271, 8vo ed.; *Traité du Contrat de Mandat*, c. v. *Œuvres*, Vol. II. p. 897, 4to ed. See also *Furrière's Dict. de Droit et de Pratique*.

<sup>4</sup> Eccl. Law, tit. Proctor.

the permission to use the name of a proctor in bringing or defending suits, for that was business which clearly appertained to the office of a proctor; and the next, to use a proctor's name in suing out probates of wills and other matters. In this prohibition itself, in this particular mode of framing the section, the legislature took the distinction between contentious suits, which are matters appertaining to the business of a proctor, and the obtaining probates of wills, which are not so, and which, therefore, required to be specifically mentioned by name, and are specifically mentioned by name in the statute for the purpose of being prohibited from being done by a third person in the name of a proctor. The 10th section is only directed against the improper alliance of unqualified parties with proctors. The defendant here made no such alliance, and therefore does not come within the words of the section. It is impossible to give a literal meaning to the words of the 10th section, for that would be to prevent proctors employing their clerks to do the work of their offices.

[THE LORD CHANCELLOR. — Not if paid a weekly salary; the section prohibits from so acting persons who are to participate in the profits.]

That may be so; but what effect, then, is to be given to the 11th section, which says that nothing herein contained shall extend to a salary paid by a proctor to a clerk who is really and *bonâ fide* serving in the office at the time of the passing of this Act? That section includes the clerk.

[THE LORD CHANCELLOR. — The salary may be in the shape of payment of a particular sum, — any salary partaking of the nature of a fee or reward.]

It must be admitted that the statute is very imperfectly worded in the 10th section; but its real meaning appears to be what is now contended for. The 10th section omits \*some \* 650 important words contained in the 9th section; such, for instance, as those which relate to the business of administrations and licenses. Why were these words left out, except for the purpose of preventing the application of the numerous prohibitions in the 9th section? A proctor is a procurator, or person who does an act under a proxy; but there can be no proxy except in the case of a litigious contestation. After the proxy is given, and till it is withdrawn, he is *dominus litis*. Burn's Ecclesiastical Law.<sup>1</sup>

<sup>1</sup> Vol. III. 9th ed. by Phillimore, 376.

[LORD BROUGHAM. — In Scotland, where the law of the country comes from the civil law, proctor means an adviser. Hence the phrase, "The Court having heard the parties' procurators."]

But that can only be applied to litigated business. The cases cited on the other side, if properly considered, show that the Courts have only treated as proctorial acts those which are done under the authority of a proxy. The acts here complained of are not exclusively proctorial.

Then, as to the objection with respect to the fees. It may be true that, if a proctor did these acts, the registrar might tax his bill; but if a registrar does the acts, the fees in respect of them are settled by statute, and there may be an action against him if he takes too much. It seems, also, that in the Ecclesiastical Courts the charges of the registrar go directly before the Judge, whereas those of the proctor go in the first instance before the registrar.

Now, as to the question of the admissibility of the evidence. The statute on which this action is brought was passed in the year 1814, adopting the provisions of an English Act passed in the previous year;<sup>1</sup> and not a single action of this sort has been brought upon this statute, though the evidence of Mr. Raikes, of \* 651 Chester, given \* in this case, shows that a practice of this sort has existed in that diocese, at least, if not elsewhere.

Now, in construing Acts of Parliament, usage may be most important. *The Bank of England v. Anderson*.<sup>2</sup> The absence, therefore, of any action of this sort on the English statute, affords strong evidence of what has been the practical construction put upon the English Act by the practitioners of the Courts of this country. The principle adopted in that case is well expressed by the present Sir J. Wigram, in his work on "Extrinsic Evidence":<sup>3</sup> "It is upon the principle before adverted to, namely, that all writings tacitly refer to the existing circumstances under which they are made, that Courts of Law admit evidence of particular customs and usages in aid of the interpretation of written instruments, whether ancient or modern, whenever, from the nature of the case, a knowledge of such customs and usages is necessary to a right understanding of the instrument. The law is not so unreasonable as to

<sup>1</sup> 53 Geo. III. c. 127, §§ 8, 9, 10.

<sup>2</sup> 3 Bingham, N. C. 589, 666.

<sup>3</sup> Propos. 5, examp. 4, p. 57. See also *The Attorney-General v. Brazen Nose College*, 2 Clark & Finnelly, 295.

deny to the reader of any instrument the same light which the writer enjoyed." The principle here so clearly stated applies, as the case already cited shows, to statutes, as well as to ordinary written instruments; and the evidence was therefore admissible to explain or illustrate the meaning of this particular enactment.

*Mr. Napier*, in reply. — As to the Statute of Hen. VIII. all that was to be done under that statute was as registrar, as the public officer of the Court. The argument on the other side is good for nothing without introducing into the last statute the word "exclusively," — thus, "exclusively appertaining to the \* functions of a proctor." But that word is not in the \* 652 statute, and cannot be introduced into it in order to favour a particular construction.

THE LORD CHANCELLOR proposed the following questions for the consideration of the Judges: "In an action at law brought against a registrar of an Ecclesiastical Court in Ireland, to recover a penalty claimed by the declaration to have been forfeited by the doing of certain acts alleged to appertain to the office, function, and practice of a proctor, would it be competent to the defendant to give evidence that for several years it had been the practice of the registrars of different Ecclesiastical Courts to do such acts as those referred to in common with proctors?"

"Would such a declaration be sustained by proof that the defendant was not a proctor, and that he had prepared the documents, and done the acts necessary for, and connected with, the obtaining and procuring letters testamentary and probates of wills, and extracting probates of wills, and drawing and preparing inventories of goods of deceased testators, schedules of such goods, and affidavits of verification, and certificates thereunto annexed, fiats for commission to swear executors, renunciations of executors, &c. in the absence of any evidence that the acts done and the instruments or documents so prepared appertained and belonged to the office, function, and practice of proctors?"

BARON PARKE, in the name of all the Judges, requested time to answer these questions.

1851. July 9.

The following opinions were afterwards delivered by the Judges.

Mr. JUSTICE TALFOURD. — My answers to the questions \* 653 proposed by your Lordships \* to her Majesty's Judges are, to the first question in the affirmative, to the second in the negative.

The answers to both questions seem to depend on the solution of this inquiry, whether the 9th section of 54 Geo. III. c. 68, intituled "An Act for the better Regulation of Ecclesiastical Courts in Ireland, and for the more easy Recovery of Church Rates and Tithes," contains a legislative declaration that acts done in obtaining probates of wills, letters of administration, and marriage licenses are, within the 10th section, "Acts appertaining or belonging to the office, function, or practice of a proctor," so as to subject a party performing one of such acts to the penalty of 50*l.* imposed by the latter section, although not professing to do those acts in the name or character of a proctor, and independently of any evidence showing that those acts are in themselves of a proctorial character. If the 9th section of the statute does contain such legislative declaration, then evidence to show that such acts have been usually performed by registrars is inadmissible, and the declaration is supported by the mere proof that they were done by the defendant, not being a proctor; if it contains no such declaration, I apprehend the converse of both propositions follows.

The object of the 9th section is to prevent proctors from giving the sanction of their names to the practice of persons who may want the skill and experience which the state of a proctor presumes, and who will not be personally amenable to the Courts of which proctors are officers. The object of the 10th section is to protect true proctors and the public from the exercise of proctorial functions by persons not entitled as proctors to perform them. [The learned Judge here read the 9th and 10th sections.]

Now it is obvious that these sections are not correlative; that the penalty incurred by strangers under the last is not \* 654 \* confined to cases in which proctors may be liable to punishment by the first. They are independent provisions, framed to meet distinct evils; the first is directed against a proctor selling the proctorial character; the second is directed, not merely against persons buying it, and acting in the names of proctors, but against persons doing proctorial acts, whether in their own names or those of others. Neither do I see any reasonable intendment

that the legislature desired to enumerate in the 9th section cases in which absolutely, and without reference to assumption, the 10th should apply ; for, if such was the intendment, the enumeration is manifestly imperfect, as there are many cases of proctorial action, at least as much dependent on skill and as much requiring supervision as those mentioned, which are left unnoticed.

In the absence of such intendment, it seems to me that the question, whether any particular act done out of Court, and not in prosecution of a suit, is necessarily a proctorial act, is left open to evidence, and that the general words of the 10th section are well construed by applying them to all cases so proved, and to other acts which may lawfully be done by any one, but which if done by a party under the assumption that he is a proctor, do then so appertain to the office he assumes as to subject him to the penalty prescribed. I think the very enumeration of the particular acts contemplated by the 9th section after the words "which shall appertain to the office of a proctor" tends to show that those acts so enumerated do not necessarily, like the suits, "so appertain"; but that, being acts generally performed by proctors, it was desired to prevent proctors from delegating to others a right to perform them in their names, although without such assumption others might lawfully perform them; else the object might have been attained by simply employing in the 9th section the words of the 10th, \* "any act, matter, or thing in any way apper- \* 655 taining to the office, function, or practice of a proctor."

If there is no legislative declaration defining particular acts to be acts appertaining to the office of a proctor, it seems to follow, that whether any particular act does so appertain, is matter of evidence; and if so, proof that such act has been for some years performed by other officers or persons is admissible on the part of the defendant on that issue. On this ground, and not on any exception in favour of registrars as distinguished from others, I think the first question should be answered in the affirmative.

Considering, for the reasons already offered, that there is no legislative declaration that any one of the acts enumerated in the second question is necessarily a proctorial act, I think, in the absence of evidence which it assumes, it should be answered in the negative.

MR. JUSTICE WILLIAMS. — The first of the two questions put to



the Judges by your Lordships in this case I answer in the affirmative, and the second in the negative.

I will take leave to give my reasons, in the first place, for my answer to the second question.

The point involved in it seems to be, whether a registrar of the Ecclesiastical Court, by preparing the documents, or doing the acts necessary for and connected with the obtaining and procuring letters testamentary, and extracting probates of wills, and the other things mentioned in the second question of your Lordships, does any act which, *per se*, independent of extrinsic evidence, is demonstrated to appertain or belong to the office, function, or practice of a proctor, within the meaning of § 10 of the Statute 54 Geo. III. c. 68, which relates to Ireland.

\* 656 \* It appears to be impossible to maintain the affirmative of this proposition, unless the 9th section of the statute amounts to a declaration by the legislature to that effect. And I am of opinion that it does not.

The object of that section was to prohibit a proctor from lending himself, or his name, to others, not being proctors, for their profit, either wholly or by way of participation. And the legislature appears to have regarded it as mischievous that a proctor should so conduct himself, not only with respect to his *proper* proctorial office and function in representing parties for whom he appears in prosecuting or defending suits, but also with respect to his practice in obtaining, as proctor, probates of wills, letters of administration, and marriage licenses. The enactments of the section are framed in accordance with this view ; and the remedy would certainly have been incomplete if it had stopped short of this ; for example, it would have made it penal for a proctor who wished to retire from business to let out his name for hire to one not a proctor, for the purpose of making profits by prosecuting or defending suits in his name, but it would not have made it penal to sell so much of his business as consisted of obtaining, as proctor, probates and letters of administration, and marriage licenses, with a permission to use his name as proctor in carrying it on.

In this view of the case, the 9th section undoubtedly declares the fact, that the obtaining, as proctor, of probates and letters of administration, and marriage licenses, belongs to the practice of a proctor. But it is quite consistent with this fact that at the time of the passing of the statute it was, and had long been, the estab-

lished and lawful usage of the Ecclesiastical Court, fully recognized by the Judge, and acquiesced in by the proctors (and in accordance with the practice as disclosed to be already in existence, partially, if \*not wholly, by the Statute 21 \*657 Hen. VIII. c 5), that in cases where the applicant for probate, or letters of administration, or a marriage license, could not or did not choose to employ a proctor, the registrar himself might prepare the requisite documents, and take the requisite steps, and make charges for his trouble in so doing. If such a usage could be shown to have existed concurrently with the proctorial privilege that a proctor might act in the same way, in case the applicant should choose to employ one, although a proctor, so employed, would be doing an act belonging to his practice as a proctor, yet, as it seems to me, a registrar so acting would be doing an act belonging to his office of registrar, and consequently he would not be doing an act in any way appertaining or belonging to the office, function, or practice of a proctor.

For these reasons I am of opinion that the 9th section does not amount to a declaration by the legislature that, in all cases, and under all circumstances, a registrar who has prepared the documents and performed the acts described in the second question of your Lordships has done an act appertaining or belonging to the office or function or practice of a proctor.

The views which have induced me thus to answer the second question of your Lordships in the negative lead me also to answer the first question in the affirmative. For I think it would be competent to the defendant in the supposed action to give the evidence suggested by that question, for the purpose of repelling the allegation in the declaration, that the acts described appertaining to the office, function, or practice of a proctor.

MR. JUSTICE ERLE. — Both the questions appear to me to depend on the same point, and the effect of the facts raising the point is, that \*the defendant as registrar did for gain the \*658 acts requisite for obtaining probate.

The point is, whether from these facts it follows in law that he did an act appertaining to the function, office, or practice of a proctor.

The plaintiff maintains the affirmative, on the ground that the

9th section has made the acts requisite for obtaining the probate not only to appertain to the practice of a proctor, but also to be his right, exclusive of all others.

But I am of opinion that the 9th section does not admit of the construction so contended for. The intention of the 9th and 10th sections appears to me to have been to prohibit the fictitious performance of the part of a proctor, and to require that the person professing to be a proctor should be really so when he acts for gain.

By the 9th section a proctor is prohibited from permitting his name to be used by another in all matters of contentious jurisdiction, and in three matters of voluntary jurisdiction.

By the 10th section persons not proctors are prohibited from acting as proctors, either in their own names or in the names of proctors, and this whether the proctors whose names are used have permitted such use or not; and it extends not only to the matters mentioned in the 9th section, but also to all other matters appertaining to the office, function, or practice of a proctor.

According to the plaintiff, these two sections were intended, not only to take away from registrars matters which upon the evidence were their right, and a profit of their office at the time, and probably had been so for some centuries (regard being had to the 21 Hen. VIII. c. 5, limiting the fees which they are to receive for doing them), but also to grant a monopoly over those matters to proctors. And although such intention is not expressed \* 659 directly by the \* words of the enactment, nothing being said of forfeiture, or compensation, or grant, or alteration of any existing right, yet it is supposed to be a necessary inference, from the two sections being correlative in this respect, that the 9th section is directed against the proctor permitting his name to be used in obtaining probate, and that the 10th section is against the person, so permitted, so acting.

But even if this effect be given to the two sections, and if they are so correlative, and a person using the name of a proctor by his permission in obtaining probate be liable to the penalty in the 10th section, and acts done in obtaining probate, if done in the character of proctor, are matters appertaining to the practice of a proctor, yet it does not follow that the same acts when done by a person having right to do them in his own name, and without

ference to any proctorial capacity, should be acts appertaining to the practice of a proctor prohibited by the 10th section. Though the copying of the will for the purpose of obtaining probate is prohibited, if the writer, in so copying, professes to act as a proctor, yet the same act of copying by a law-stationer upon the hire of the executor, for the same purpose, may not be prohibited; and though the preparing of an inventory, if done by him as proctor, is prohibited, still the same preparing of an inventory by an appraiser, on the same hiring and for the same purpose, may be lawful. I cannot suppose that the legislature would prohibit an executor from obtaining a copy of the will and an inventory unless he first retained a proctor. And if a writer or an appraiser would not be liable to a penalty in the cases above supposed, neither is the registrar liable in the case before us; for at the time of the passing of the statute, part of the acts requisite for obtaining probate appertained to the practice of a proctor, and the same part also at the same time appertained to the practice of a registrar, both \* having a concurrent right to do the acts, and \* 660 either doing them according as the suitor chose. The registrar, as registrar, might do the acts, or the proctor as proctor; and they would appertain to the practice of a proctor if the person doing them professed to do them as proctor. The statute in words applies to proctors, regulating them and protecting them, and both sections may have full operation, whether registrars continue their practice or cease therefrom. Indeed the notion that the 10th section includes registrars because it correlates to the 9th, seems far from a logical inference, seeing that the lending of a proctor's name, prohibited by section 9, makes it probable that the correlative borrowing of such name would be also prohibited, but does not at all make it probable that a person should be prohibited from acting who neither lends nor borrows any name, and neither has nor professes to have any proctorial relation.

If it was conceded that the words are capable of including registrars, there are reasons for supposing that they were not intended to be included; for if the legislature intended to change the general practice of all registrars throughout England and Ireland (there being an English statute also), and to turn what had been theretofore acts of duty into offences subject to penalties, justice required that the registrars should have notice by name, and

that a day should be fixed for the change, and that so penal a law should at least be expressed so as to be commonly understood, and that the proctorial acts to which the law was to apply should be defined.

But the contrary of this is the case; the registrars are not named; no time is fixed; the change was made, if at all, at the time when the statute came into operation, and the penalties then began to attach in respect of acts which the moment before \* 661 were duties, and which at that moment \* may have been in the course of completion. So far from the law being clearly expressed, it is so worded that it was not perceived at all at the time of the enactment, nor for thirty years after, although it would have affected numerous and important interests if it existed; and now, after full discussion, the majority of the Judges of the land to which the Irish statute applies cannot find it, *though* they are men remarkable for learning, vigour, and acuteness; and so far are the acts from being clearly defined to which the penalties are attached, that those who now concur in awarding the penalties against the defendant are not agreed as to the acts to which the statute extends, and cannot point out the line between duty and delinquency; for the declaration charges some acts to be proctorial which are admitted to be curial, as the issuing of the commission; other acts, supposed to be proctorial, are so combined with what is curial, that the registrar must take part in them; thus the affidavit is said to be proctorial, but as it is to be annexed to the commission, which is curial, the registrar must annex it, and be responsible for it; and thus the copying of the will is said to be proctorial, but as it is in the certificate of probate, which is curial, the registrar must be responsible for the copy contained therein; and thus the inventory is said to be proctorial, but it is in substance prepared by an appraiser employed by the executor, and he would be as much liable to a penalty for preparing the substance as the registrar for furnishing the form. These considerations appear to me strong against the plaintiff's construction of the statute, and in favour of a construction whereby the rights and duties of proctors would be protected and regulated, and other rights and duties would remain as they had before existed.

The argument of intention in the legislature from experience \* 662 diency appears to me to be also adverse to the plaintiff. \* It is said that the registrar in doing the matters in question

acts inconsistently with his duty as taxing officer ; for if he makes overcharges the suitor would have no redress from his taxation of his own bill, and it is supposed that these matters were taken from the registrar, and given to the proctor, to save the suitor from the risk of overcharge. But if a proctor is necessarily required in all cases, the suitors, as a body, would always pay more than at present, and the effect of the supposed enactment would be to establish an increased payment on all occasions, for the sake of saving the risk of an increased payment on some occasions. Besides, unless the registrar is dishonest, there could be no increased charge, and if he is dishonest in charging, he might be the same in taxing, and so give no relief. Also, if he was dishonest, and did overcharge, the suitor is not now without remedy, as he might bring the registrar before a jury, for extortion, and before the judge of his Court, for misconduct.

The law is best administered if a suitor, at least in an uncontested matter, can attend to his own interests, and his advantage would be sacrificed if an additional necessity for a legal adviser was created.

For these reasons I am of opinion that the plaintiff has failed to make out the construction of the statute necessary to support his case ; and that although the defendant did the acts proved against him, it does not therefore follow, by law, that he did matters appertaining to the practice of a proctor within the 10th section ; consequently the answer as to the first question is in the affirmative, and as to the second question in the negative.

MR. JUSTICE WIGHTMAN. — As the answer which I propose to give to the first of the questions put by your Lordships depends mainly upon \* points which have determined my \* 663 answer to the second, it will be more convenient that I should state my answer to the second of those questions first.

The second question is, whether such a declaration as that in the case of *Stephenson v. Higginson* would be supported by proof of such matters as are stated in that question.

The declaration is founded upon the 10th section of the 54 Geo. III. c. 68, by which it is illegal for any person who is not a proctor to do any thing in any way belonging to the office, function, or practice of a proctor, for fee or reward. Proof that the defendant, not being a proctor, prepared the document and did the acts neces-

sary for and connected with the obtaining and procuring letters testamentary and probates of wills, and extracting probates of wills, and drawing and preparing inventories of goods of deceased testators, schedules of such goods, and affidavits of verification, and certificates thereto annexed, fiats for commissions to swear executors, and renunciations of executors, would, if the defendant prepared the documents, and did the acts for fee or reward, sustain the declaration, if the preparation of those documents and the doing those acts necessarily and as a matter of legal inference appertain or belonged in any way to the office, function, or practice of a proctor, though no evidence to that effect was given.

Is it then an inference of law requiring no proof that the preparation of such documents and the doing such acts appertain and belong to the office, function, or practice of a proctor ?

In considering this question, it is necessary to refer to the immediately preceding section of the Act of Parliament. By that section, the ninth, it is enacted — [the learned Judge read it.]

Reading the two sections in connection with each other,  
 \* 664 \* it seems clear to me that obtaining probates of wills or letters of administration is doing a thing appertaining and belonging to the office, function, or practice of a proctor within the meaning of the Act of Parliament, and that it was the intention of the legislature, by the 9th section, to prevent proctors lending their names to unqualified persons, or acting themselves for the benefit of such persons, in the matters of business specified in that section, and by the 10th, to prevent unqualified persons acting *proprio jure* in matters appertaining and belonging in any way to the office, function, or practice of a proctor, including, as it must, to avoid inconsistency, the matters particularly expressed in the 9th section, which proctors are prohibited doing, as *such*, for the benefit of unqualified persons.

A different construction would enable the registrars or any other persons not proctors not only to do all the acts stated in the second question of your Lordships in their own names, for fee and reward, but to allow their names to be used for the profit of unqualified persons, which the legislature can hardly have intended. By the 9th section of the Act the obtaining probates of wills is mentioned as a description of business which might be done by a proctor as such, and for a profit, but he is prohibited from allowing unqualified persons to do the same acts in his name for a profit, or to

do them himself for the profit of unqualified persons; and taking the 9th and 10th sections together, it appears to me, that by the 10th section all persons not proctors are prohibited, under a penalty, from transacting any of the business specified in the 9th section for fee or reward, such business by the statute itself appearing to appertain and belong to the office, function, and practice of a proctor. And I therefore answer the second of your Lordships' questions in the affirmative, the acts specified being done in obtaining probates or letters of administration. .

\* The reason upon which I have answered the second \*665 question in the affirmative being that the acts stated in the declaration to have been done by the defendant do appertain to the office, function, or practice of a proctor by the terms of the Act of Parliament, it follows as a consequence that my answer to the first of the questions proposed by your Lordships is in the negative, and that evidence of practice or custom would be inadmissible to show that such acts do not appertain to the office, function, or practice of a proctor.

If it was a mere question of fact to be determined by a jury, such evidence would no doubt be admissible; but as it appears to me that the matter is one of judicial cognizance, turning upon the construction of the terms of the Act of Parliament, the evidence ought not to have been received.

THE LORD CHANCELLOR. — My Lords, one of the learned Judges, present at the hearing of this case, is unable to be present to-day. He has, however, considered the case, and has committed his opinion to writing, and one of the learned Judges now present, Baron Alderson, is prepared to read it. I would therefore propose that that opinion should be read by that learned Judge. It has been done before. It must not, however, be considered by any means as a matter of course. I see no objection to its being done on the present occasion, and therefore I move your Lordships that the judgment of Mr. Justice Coleridge be read by Baron Alderson.

LORD BROUGHAM. — My Lords, I have no doubt whatever as to the proper course to take, with the qualification expressed by my noble and learned friend, that it is not to be considered quite as a \* matter of course. But no mischief can arise \*666



from allowing this to be done. In the first place, if we had not the benefit of the learned Judge's opinion in this form, we might have it in another form, which has happened more than once here, particularly in a very well known case, — the *Bethnal Green Case*, — in which there was great difference of opinion in the Exchequer Chamber, and in which case we had the benefit of having the manuscript judgments of those learned persons, which were not used in moving the judgment of your Lordships.<sup>1</sup> But, independently of former cases, to which my noble and learned friend has referred, in which the same thing has been done precisely as is proposed to be done now, there is no difference of principle, when you come to consider it, between the course now about to be taken and that which is taken every day, namely, that of one of the learned Judges in the absence of all his brethren reading their opinions. In that case it comes to your Lordships, not as the opinion of that learned Judge who reads it, but as the opinion of all his absent brethren. So that really in principle there is no difference. Though I agree with my noble and learned friend, that it ought not to be taken as a matter of course.

The motion was agreed to.

BARON ALDERSON. — My Lords, I have to read to your Lordships the opinion of my brother Coleridge.

“It appears to me that the answers to your Lordships' questions depend in great measure upon the proper construction to be given to the 9th and 10th sections of 54 Geo. III. c. 68; and that it will be more convenient to determine that construction in the first instance. The questions indeed arise expressly on the 10th

\* 667 section; but \* the two seem to me in a great degree, if not entirely, correlative to each other; and in order to settle the meaning of the latter, the better course is to ascertain that of the former. This makes it an offence punishable by striking off the roll or suspension, for any proctor, among other things, ‘to act as such, or permit his name to be used in any manner in any suit the prosecution or defence of which shall pertain to the office of a proctor, or in obtaining probates of wills, letters of administration, or marriage licenses, on account or for the profit of any person not entitled to act as a proctor.’ The words ‘to act as such, or permit his name to be used,’ clearly override and govern all that

<sup>1</sup> See post, p. 697.

follows. The proctor may neither act as such himself, nor permit another to use his name in acting, in any suit in which it is the duty of a proctor to prosecute or defend, or in obtaining probates, &c. for the profit of any one not entitled to act as proctor. There are no words of exception; he may no more act for the benefit of a registrar, or allow a registrar to use his name, than any other person; nor is any distinction pointed out between things which a proctor only can do and things which he may do but others also have concurrent right to do. As to the suit, it is enough to bring a case within the statute if it be one the prosecution or defence of which pertains to his office; and as to the residue, the specific acts are mentioned. Whoever might do them before (if any one could), it is thenceforward penal for the proctor to do them, or to allow any one to do them in his name, for the benefit of one not entitled to be a proctor. Certain specified savings follow; but these do not affect the present case, except in so far as the expression of them may seem more pointedly to exclude all other savings or exceptions; so general is the provision as to proctors; and it is clear that it would not be a defence to a proctor charged under this section to show that the person for whom he \* had acted or whom he had suffered to use his name was \* 668 a registrar.

“The 10th section then takes up the case of the other party to the practices which the statute was passed to prevent;—the case, namely, of those who, not being proctors, shall act as such, whether in their own names or in the name of any other person, in consideration of gain, or with a view to participate in the profit. Here, too, the words are very general; no exception is made of registrars or any other class; nor, in describing the acts forbidden, is any distinction made between acts exclusively proctorial and any which registrars may have a concurrent right to do. If they ‘in any way appertain or belong to the office, function, or practice of a proctor,’ it is forbidden to every one, without exception, who is not ‘admitted and enrolled’ as a proctor, to do them in consideration of gain, or with a view to participate in the benefit to be derived from the office, function, or practice of a proctor. Here, again, if the act done was shown to be within the provisions of the section, it would be no defence for the party to show that he was a registrar, or that he had been accustomed to do them before the law was made.

“The only question then seems to me to be, what acts within the meaning of the statute ‘appertain or belong to the office, function, or practice of a proctor.’ And I think that the legislature has itself declared that at least all such acts fall within that category as are mentioned in the 9th section. Unless we hold this, the registrar may still do this in his own name for profit which the proctor is restrained from doing for him in his name, or allowing him to use his name in the doing of. And what is still stronger, the registrar may do in the name of the proctor what the proctor will be struck off the rolls if he allow him to use his name

\* 669 in the doing of; for the prohibition of the 10th section \* extends to the doing in the name of any other person as well as in his own. If the registrar is not prevented from the latter, how can he be from the former; and if he is not prevented from the former, why may he not, with a proctor’s leave, use his name, which yet, if he does, as to any act specified in section 9, the proctor admittedly will be brought within the penalty of that section?

“But the words of the 10th section as to the acts forbidden are not so specific as those of the 9th. The 9th section speaks of ‘suits the prosecution or defence of which shall appertain to the office of a proctor, and the obtaining probates of wills, letters of administration, or marriage licenses.’ The 10th speaks of ‘any act, matter, or thing whatsoever in any way appertaining or belonging to the office, function, or practice of a proctor.’ These words may certainly include more than the former; and wherever the question arose with regard to any act done not within the 9th section, other modes of interpretation must be had recourse to than that already relied on.

“I come now to the answers which I think ought to be given to your Lordships’ specific questions. And as to the first, if the declaration only alleged acts which fell within the provisions of the 9th section, the defendant could not, in my opinion, be allowed to give the evidence stated in that question; it would be simply irrelevant, in the case of a statute so recently passed, to show that registrars had been used to do such acts for any number of years before or since it passed, as those which it was clear the statute prohibited. But I am not prepared to say, looking at the very general language of the question, that in no case might such evidence be receivable. The declaration might charge acts not

expressly within the language of the 9th section, and allege them to be acts which appertained to the office or functions or practice of a proctor; and in order to meet this \*allegation, which would be simply one of fact, it might be material to show that registrars always did those acts; whence it might be argued that they pertained to the office or functions or practice of a registrar, and therefore did not appertain to those of a proctor. Of course, I say nothing of the weight of such evidence, but speak only of its admissibility. I answer, therefore, the first question in the negative, with the qualifications I have just stated.

“The second question I answer in the affirmative. Some of the acts which it supposes the defendant to have done are clearly within the language of the 9th section; and it would not be necessary, in order to sustain the count, that all should be. If it was shown that the defendant was not a proctor, and had done any act necessary for obtaining a probate or letters of administration, no parol evidence beyond this would be necessary, in my opinion, to show that he had done an act which belonged to the office, functions, and practice of a proctor. I should say the same of drawing inventories, schedules, affidavits of verification, and certificates thereto annexed, and fiats for commissioners to swear executors. I am not sure that I understand what is meant by extracting probates, and therefore I doubt whether parol evidence might not be necessary as to these.”

MR. JUSTICE MAULE. — Both questions in this case turn on the construction of the 9th and 10th sections of 54 Geo. III. c. 68, of which it may be remarked in general, that they do not purport to deal with or regulate the office of registrar, or to make any mention of those officers.

Section 9 applies to proctors deceiving the Court by practising for others, or lending their names to others in proceedings in Court, contentious or not. If they do so, the Court may punish.

\* Section 10 applies to persons, not proctors, doing any thing in any way appertaining to the practice, &c. of a proctor, in their own name or in the name of any other person. This has a more extended application than section 9, and is, I think, intended to prevent persons not proctors deceiving their

employers, by making them believe that the business they pay for has been done by a proctor, whose name is used, but who did *not* do the business, or that the person who did it was a proctor when he really was not. For doing so, the offender is to forfeit 50*l.*, to be recovered by action. This section applies to all business in any way appertaining to the practice of a proctor; section 9 only to business done in Court. So that I conceive that the penalties in section 10 would be incurred, not only by a person not a proctor who borrowed the name of a proctor, who lent it in violation of section 9, but by one assuming that character, and doing any thing relating to what proctors are commonly employed about, such as advising in matters of law or practice ecclesiastical, or preparing documents such as proctors commonly prepare, though the same acts might lawfully be done by a person who is not a proctor, provided he did not assume that character or act in the name of one. It might be said, if he could act without being a proctor, why should he assume the character; and what harm is there in assuming it if he does no more than he lawfully might? But it is evident that a mischievous deception is practised on a person who is made to believe that he is paying for the skill and experience which a proctor must be presumed to possess, when in fact his business has been done by a person not having that qualification. Where the act is one which, though ordinarily done by a proctor in the course of his practice, is yet one which may lawfully be done by a person who is not a proctor, such as preparing an instrument or doing other things out of Court, if the person doing it represent that he is a proctor, or that the business is done by a proctor, he is within this section doing an act pertaining to the practice of a proctor, though if he did not pretend that the work was done by a proctor he would be guilty of no offence. It appears to me that with regard to things usually but not necessarily done by proctors, when the person doing them holds himself out as a proctor or represents that they were done by a proctor, he is doing things appertaining to the practice of a proctor; but where he does not so hold himself out, or make such representation, the things done do not appertain to the practice, &c. of a proctor, and no offence is committed within section 10.

The section is not generally for pretending to be a proctor, and deceiving by such pretences, and therefore could not apply to

persons pretending to be proctors, and by such pretence obtaining credit or advantage of any kind, but doing nothing which proctors usually do in the course of their professional business ; the object of the two sections being to prevent the Court or the public from being deceived by having proctor's business pretended to be done by proctors, but really done by others. When neither the Court nor the public is so deceived, I think the sections do not apply.

It appears therefore to me, that if the practice of the Ecclesiastical Courts allowed persons in general, not proctors, to do any particular kind of business, though such business might also be done and commonly was done by proctors, the doing such business in his own name, without using that of a proctor, by a person not a proctor, and not pretending to be one, would be no offence within the Act. And the same would be the case with a particular class of persons allowed by such practice to do certain acts. I do not think that the 9th section, which speaks of obtaining \* probates, &c. as acts which may be done and are done by \* 673 proctors as such, is to be taken as a declaration that they can only be done by proctors ; though I think it certainly shows that they may be done by proctors in that character ; so that a person acting as a proctor, that is, assuming to be one, or using the name of a proctor in obtaining probates, &c. would be doing an act appertaining to the business of a proctor within the 10th section.

My opinion therefore is, that a person who, without assuming the character of a proctor or using the name of one, does an act which, though such as proctors may do and usually do in the course of their practice as such, is not an act which they alone may lawfully do, is not within the prohibition and penalty of the 10th section, and that the 9th section does not supply the assumed want of evidence, that the act supposed in the second question appertains to the practice of a proctor. I consequently think that on the supposition of that question the assumed declaration would not be supported.

With regard to the first question, it would be a material question, in the case supposed, whether the acts done appertained to the practice, &c. of a proctor. The nature of the acts is not suggested in this question, and they must be assumed to be such as that it is a question of fact whether they appertain to the office of

a proctor. On the before-mentioned construction of the 9th and 10th sections, if the act done is one that others as well as proctors do, it would be an act not appertaining to the practice of a proctor, unless done under the assumption of this character or in the name of one. The supposed evidence would therefore be material, and admissible on this question.

MR. JUSTICE PATTESON.—In answering the first question put by your Lordships to her Majesty's Judges in this case, I feel myself in some little difficulty, arising from the use of the words "certain acts," without any specification of the very acts themselves. I apprehend it to be a question purely of fact whether any given act does or does not appertain to the office, function, or practice of a proctor, unless that given act be such as that the Court or a Judge, in any action at law respecting it, is bound judicially to notice its character and relation to such office, function, or practice. But I also apprehend that the Court or a Judge may be bound to take such judicial notice, either by some rule of the common law or by reason of the enactments in some statute. In the absence of any such rule of law or statute, I am of opinion that in such an action as is stated in your Lordships' question, it would be competent to the defendant to give evidence that it had been the practice of the registrars of different Ecclesiastical Courts to do such act in common with proctors, because although such evidence might not necessarily negative the fact that the act in question did in some sense appertain to the office, function, or practice of a proctor, yet it would be relevant to that question of fact, and would therefore be proper to be admitted to the jury, in whose province it would then lie to determine the fact. Taking, therefore, the words of the question first put by your Lordships in the most general and unrestricted sense, and assuming the absence of any such rule of law or statute as I have already alluded to (but only by reason of such assumption), I answer your Lordships' first question in the affirmative.

The second question put by your Lordships directly raises the point as to the proper construction to be put on the 10th section of the Statute 54 Geo. III. c. 68, taken in connection, as I apprehend it necessarily must be, with the 9th section of the same Act.

Now the 9th section makes it highly penal in any proctor \* 675 \* to act as such, or to permit his name to be used for the

benefit of any person not a proctor, or to allow such person to participate in his profits, as well "in any suit the prosecution or defence of which shall pertain to the office of a proctor," as "in obtaining probates of wills, letters of administration, or marriage licenses." The legislature here treats the obtaining probates of wills, inclusive, as I apprehend, of all steps incident to such obtaining (which are the matters mentioned in your Lordships' second question), as appertaining in some way to the office, function, or practice of a proctor, or at all events as that which may be done and is ordinarily done by a proctor. But this section, though highly penal against the proctor himself, contains no penalty against the person, not a proctor, for whose benefit the business is done.

Then follows the 10th section, which applies exclusively to persons not proctors, and inflicts a penalty of 50%. The words of that section do not in terms embrace the case of a proctor acting as such for the benefit of one who is not a proctor, or permitting such person to participate in his profits, though the proctor himself would be punishable for so doing under the 9th section, for the words of the 10th section seem to extend only to "acts, matters, and things" done by a person not himself a proctor, either in his own name or the name of a proctor, and not to the mere participation in or taking the whole profits where the "acts, matters, and things" are actually done by the proctor himself. Yet I cannot doubt that they extend to the other branch of the 9th section, namely, to the doing by a person, not a proctor, for his own gain, in the name and by the permission of a proctor, any of those acts, matters, and things, for permitting the doing of which, in his name, the proctor is so highly punishable under the 9th section, and, amongst others, the obtaining probates of wills, which is \* expressly mentioned in that section. In \* 676 other words, I apprehend that wherever a person, not a proctor, is not merely a recipient of profits, but is an actor in the doing that which is made so highly penal in the proctor by the 9th section, he brings himself within the true meaning of the 10th section, and is liable to be sued for the penalty of 50%. ; as, for instance, if he obtains probate of a will for his own gain in the name of a proctor. It is true that the 10th section does not use the words, "obtaining probates of wills, letters of administration, or marriage licenses," which are found in the 9th section. The



words used are, "In case any person shall in his own name, or in the name of any other person, make, do, act, exercise, or perform any act, matter, or thing whatsoever in any way appertaining or belonging to the office, function, or practice of a proctor, for gain." But as the 9th section has specified the obtaining probates of wills, and thereby treated it as within the practice of a proctor (to say the least of it), I cannot doubt that it comes within the words of the 10th section, as an "act, matter, or thing in any way appertaining to the office, function, or practice of a proctor," — at any rate, wherein a proctor's name is used.

The 10th section, however, applies to cases where the act done by a person not a proctor is done in his own name, no real proctor's name being used; cases which manifestly do not fall within the 9th section at all, that section relating only to the acts of persons who really are proctors. The case put in your Lordships' second question is that of a person not a proctor doing acts for obtaining probates of wills in his own name for gain; at least, so I take the question to import, for it cannot be intended to relate to a person obtaining probate on his own behalf. Now I cannot think that the words, "any act, matter, or thing whatsoever in any way appertaining or belonging to the office, \* 677 \* function, or practice of a proctor," ought to receive a different construction where a proctor's name is not used from that which I have already endeavoured to show that they must receive if a proctor's name be used. In either case, I think that they must be construed with reference to the 9th section, and that the legislature must be taken to have exclusively enacted in the statute that the obtaining probate of a will is an act in some way appertaining and belonging to the office, function, and practice of a proctor, and so that the very case arises to which I referred in my answer to your Lordships' first question, namely, that in which the Court or Judge is bound to take judicial notice of the character and relation of the act done, by reason of the enactments of the statute, and by consequence to exclude any evidence of the practice of Ecclesiastical Courts.

With regard to any distinction between registrars of the Ecclesiastical Courts and other persons unconnected with such courts, I am unable to see on what ground it can be made; the statute in the two sections in question has made no exception in favour of registrars; indeed, it does not mention or allude to them at all.

It is plain that the obtaining probate of wills can be no part of their duty as registrars; if it was, they would have some remuneration assigned them for doing it, or must do it gratuitously; neither of which state of things is pretended to exist; and their duty as officers of the Courts would seem in many respects to be inconsistent with their practising in any way in those Courts. They must, therefore, be treated with reference to this statute in the same way as mere strangers wholly unconnected with the Courts. Assuming them to have been in the habit of obtaining probates of wills and doing other acts not of a contentious nature for gain, that habit cannot legalize what is in itself illegal, much less can \* it alter the provisions of a statute. If, in- \* 678 deed, the question could be an open one of fact, that habit would be evidence of the character of the act done; but, as I have already said, it appears to me that the question is not an open one of fact, but one which is conclusively determined by the enactments of the legislature.

It is argued that the 10th section is framed for the protection of proctors, and applies only to acts 'which appertain to the office, function, and practice of a proctor, exclusive of all other persons, and that obtaining probates of wills, and other such *ex parte* and voluntary proceedings not being of a contentious character, and which do not require any proxy to be exhibited, and which are done by a person in his own name, not practising any deception nor pretending to be a proctor, are not within the section. I cannot, however, gather any such intention from the words used by the legislature, which are "in any way appertaining"; words of as large and extensive a meaning as I can well conceive to have been used; nothing being said as to falsely pretending to be a proctor, or any thing of the kind. I should rather conjecture, if this was properly matter of conjecture at all, that the legislature had in view acts of the very like description mentioned in your Lordships' second question; for it is hardly likely that any person could do, in his own name, acts which required the exhibition of a proxy, or any acts but those of a common and ordinary character. Conjecture, however, is not admissible. I found my opinion on the words of the statute, the construction of which appears to me to be such that I am bound to answer the second question in the affirmative.

Some doubt may exist whether one or two of the acts specified

in the question may not rather be acts of the Court than  
 \* 679 proctorial acts ; but as most of them are plainly \* of the  
 latter character, I presume that it is not material to enter  
 into any discussion in that respect.

**BARON PARKE.** — The answers which I give to the two questions proposed by your Lordships to her Majesty's Judges are, in the negative to the first, and the affirmative to the second ; and in giving my reasons for these answers, it will be convenient to consider both the questions together.

They both depend on the true construction of the 54 Geo. III. c. 68, the two material sections of which are the 9th and 10th. (The learned Judge read the two sections.)

Under the 9th section, if any proctor in any Ecclesiastical Court in which he shall be entitled to act as proctor shall act as such, or permit or suffer his name to be used in any suit, &c., or permit his name to be used in obtaining probates of wills, letters of administration, or marriage licenses, for or on account, &c. of any person not entitled to act as proctor, he shall be struck off the roll of proctors.

Now I think that this is a clear legislative declaration that the obtaining probates of wills, letters of administration, and marriage licenses is lawfully a part of the business of the proctors within the meaning of the Act, for they are heavily punished for acting themselves or permitting their names to be used in doing those acts for the benefit of others ; and the legislature could never have intended those very Acts to be lawfully performed by any person whatever, without using the name of a proctor at all, which, by so severe a penalty, it prohibited the proctors doing for the benefit of others, or lending their names to others to enable them to do. Surely it could not have intended to permit all those  
 acts in others, and punish the proctors for a fraud in per-  
 \* 680 mitting their names to be used, or acting \* themselves in  
 them for the benefit of others, when such a fraud was  
 totally unnecessary and useless.

It is said that the Act meant to prohibit the acting as proctors ; that is, the doing of acts representing themselves to be proctors when they really were not.

But the 10th section imposes the penalty upon any person doing the act prohibited, viz. any thing whatever in any way belonging to the office, function, or practice of a proctor ; not upon his doing

it as a proctor, or acting as a proctor, for it applies as well to acts done in his own name as to those done in the name of another, — a proctor's, for example.

The prohibition in section 9 affects those who are proctors, and those only ; and the "acting as proctors," in the several particulars therein mentioned, and thereby punished by deprivation of office, cannot mean the pretending to be proctors when they are not, and the doing of those acts under the false representation of their being proctors. The section clearly means to prohibit those who actually are proctors from acting in that capacity in the several particulars and under the circumstances therein mentioned, for fee and reward to be substantially received by another. This enactment is not for punishing fraud upon the parties employing and consulting others in matters of business, usually done by proctors, by persons representing themselves impliedly to have skill and experience which they do not possess, for it applies to proctors themselves acting personally in suits or other matters, and giving the full benefit of their skill and knowledge to their clients, provided they do it for the gain of others. It is clear that the object of the legislature was to insure the gains of the profession of proctors to those who are duly entitled to act as such.

These considerations lead, I think, to the true construction of the 10th section, which imposes a penalty of 50*l*. on \* any \* 681 person who, in his own name or in the name of another, does, acts, exercises, or performs any act, matter, or thing whatsoever in any way appertaining or belonging to the office, function, or practice of a proctor for or in consideration of gain. This certainly does not prevent parties acting for themselves nor for others gratuitously, for the clause only prevents the doing these acts for gain, fee, or reward ; but for gain or reward to himself or others it is clear that a person not admitted and enrolled as a proctor cannot act in a suit, for it is beyond a doubt that suits are part of the business of proctors.

Obtaining probates and acts enumerated in the 9th section, when done for others for reward, are also, I think, clearly meant to be prohibited in all, except proctors duly admitted and enrolled ; and strangers wholly unconnected with the Spiritual Court would be clearly liable to the penalties for such acts.

If so, it is impossible to contend that there can be any implied exception of registrars or their deputies from the nature of their

offices. There is a stronger reason for prohibiting registrars than mere strangers. Knowledge of the forms and practice of the Court they have, and are therefore qualified to do all those acts correctly; but their duties are wholly inconsistent with those of agents or representatives of suitors. They are officers of the Court; deputies of the Judge for certain purposes. It is their business to act in each case judicially; to do all curial acts without favour to anybody. To allow the registrars to have the profits of the business of proctors, even in unlitigated cases, is to set their interest against their duty. It is a part of their office to tax proctors' bills, and how can it be expected that this duty will be performed fairly, if they themselves can act in any cases, and law-

fully claim the fees and emoluments of proctors for so \* 682 doing? If there is no implied \* exception independently of usage, it is clear that usage, however long, can never support an exception to an Act of Parliament. I am of opinion, therefore, that your Lordships' questions should be thus answered: —

First, that in an action at law brought against the registrar of an Ecclesiastical Court in Ireland to recover a penalty claimed by the declaration to have been forfeited by the doing of certain acts alleged to appertain to the office, function, or practice of a proctor, it would not be competent to the defendant to give evidence that for several years it had been the practice of registrars of different Ecclesiastical Courts to do such acts as those referred to in common with proctors, for the purpose of exempting registrars from liability, on the ground of an usage for registrars to do proctors' duty. But with respect to those acts which did not fall within the description of obtaining probates of wills, letters of administration, and marriage licenses, such evidence would be admissible to show that they did not appertain to the office, function, or practice of a proctor.

Secondly, such a declaration would be sustained by proof that the defendant was not a proctor, and that he had prepared the documents and done the acts necessary for and connected with the obtaining and procuring letters testamentary and probates of wills, and extracting probates of wills, and drawing and preparing inventories of goods of deceased testators, schedules of such goods and affidavits of verification, and certificates thereto annexed, and renunciations of executors, in the absence of any

evidence that the acts done and instruments and documents so prepared appertained and belonged to the office, function, and practice of a proctor, for they all appear to be acts for obtaining probates or letters of administration, as also preparing the fiat for a commission to swear executors. The completing the fiat I suppose to be a curial act.

\* THE LORD CHANCELLOR (LORD TRURO). — My Lords, I \* 683 have to express the obligations we are under to the learned Judges for the attentive consideration they have given to this case, and for the valuable assistance they have rendered to your Lordships by the opinions which you have now heard ; from which it appears that the learned Judges are equally divided upon the questions which have been submitted to them ; and I will now move your Lordships that the further consideration of this case be adjourned to a future day.

LORD BROUGHAM. — My Lords, I entirely agree with my noble and learned friend that we must adjourn the further consideration of this question. In the mean time we shall have the opinions of the learned Judges printed. We are extremely indebted to them for the great pains which they have bestowed upon the subject, and we shall of course take their opinions into the most deliberate consideration. I should like also to have a further opportunity of considering the very learned and able opinions of the learned Judges in Ireland in the Court below, one of which I confess — that of the very learned Chief Justice — deeply impressed my mind. Under the present circumstances of this case, with an equal division of the learned Judges upon the questions which have been propounded to them, I think it would not be possible for us to dispose of this question during the present session.

Further consideration adjourned *sine die*.

1852. June 16.

LORD TRURO, after stating the nature of the action, the statute on which it was founded, the plea put on the record, and the trial, and the evidence there offered, said : The object of this evidence was professedly intended to show that the acts alleged to have been performed by the \* defendant were not acts which, \* 684 within the meaning of the statute, appertained to the office, functions, and practice of a proctor. The evidence was objected

to on the part of the plaintiff, who insisted that, by the 9th section of the statute, the acts done by the defendant — by the doing of which it was insisted that he had incurred the penalties now sought to be recovered — were, by the very statute itself, declared to be acts appertaining to the office of a proctor; and therefore that no evidence adduced to show a practice in an Ecclesiastical Court was admissible to countervail the effect and authority of the statute, and consequently that this evidence was irrelevant, and ought not to be received. The learned Judge was of opinion that the evidence was admissible in order to prove what, in point of fact and practice, did appertain to the office of a proctor. The evidence was accordingly received, upon which the plaintiff's counsel accepted against its admissibility. Several witnesses were called, all of whom gave evidence to the same effect. An exception was tendered against the reception of the evidence of each. One of them proved that in some dioceses, particularly in the diocese of Elphin, there was no proctor, and in that diocese the business was done by the registrar, or by his deputy; and that there, if any matter occurred in which the interference of a proctor was necessary, he was sent for from Dublin, or elsewhere.

The declaration having averred that the several acts imputed to the defendant all appertained to the office of a proctor, and the plaintiff not having given any evidence on the subject, the learned Judge told the jury that, in his opinion, the plaintiff had not made out a case, and that the verdict ought to be for the defendant upon the evidence so given; and accordingly a verdict was given for the defendant. But previously, and correctly, a bill of exceptions \* 685 tions \* was tendered to the direction of the learned Judge, and judgment followed upon that bill of exceptions.

(His Lordship detailed the further progress of the cause, up to the time of the questions put to the Judges in this House.)

My Lords, three of the learned Judges expressed their opinion that the evidence to which the first question put to them was directed was not receivable, and also that the evidence which is stated in the second question did support the declaration. Baron Martin, who had attended during a great part of the argument, but had not attended during the whole of it, gave no opinion.<sup>1</sup> The other Judges gave their opinion that the judgment ought to

<sup>1</sup> Baron Alderson has favored the reporter with a note stating that, for the same reason, he gave no opinion.

be affirmed, that the evidence was receivable, and that the evidence given on the part of the plaintiff did not support the declaration, and therefore that the ruling of the learned Judge at the trial was right.

Under these circumstances the case, presenting these difficulties, comes before your Lordships for decision, with this difference of opinion existing among the Judges, both in Ireland and here. The case turns upon the construction of the two sections of the Statute of the 54 Geo. III. c. 68. The particular section imposing the forfeiture, which is sought to be recovered in this action, is the 10th, and that says: [His Lordship read the section.] The question turns upon the construction of that section; but inasmuch as it would appear that its construction is said to be in fact governed by the contents of the previous section, I should also beg your Lordships' attention to the contents of the 9th section: [His Lordship read it to the words, "such proctor so offending shall be struck off the roll of proctors."] There are, then, certain cases of exception, with which it is not material to trouble your Lordships.

\*The penalty sought to be recovered in this case is the \*686 penalty imposed by the 10th section. That section is very extensive in its terms, and imposes the penalty for doing "any act, matter, or thing whatsoever in any way appertaining or belonging to the office, functions, or practice of a proctor. In construing an Act of Parliament, I apprehend every word must be understood according to the legal meaning, unless it shall appear from the context that the legislature has used it in a popular or more enlarged sense; that is the general rule; but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood in a more large or popular sense, must plainly appear. The application of that remark will be found of importance in this case.

It becomes necessary here to consider the nature of the office of a proctor. A proctor is described in several instances in Domat's Civil Law,<sup>1</sup> which is referred to in Burn's Ecclesiastical Law;<sup>2</sup> and some other books are there cited, and it is stated that "proctors are officers established to represent in judgment the parties

<sup>1</sup> Vol. I. bk. i. tit. 15; and Vol. II. bk. ii. tit. 5, § 2.

<sup>2</sup> Vol. III. (edit by Phillimore) tit. Proctor.



who empower them (by warrant under their hand, called a proxy) to appear for them, to explain their rights and instruct their cause, and to demand judgment"; and the office is recognised as a legal office in various statutes. By the 3 James I. c. 5, § 8, no recusant convict is to be allowed to practise in the civil law as proctor. By the 5 Geo. II. c. 18, § 2, it is enacted that proctors in any Court are incapable during the time they shall continue in the business and practice of a proctor from being justices of the peace. By the 55 Geo. III. c. 184, a stamp is imposed upon the admission to the office of a proctor, and every practising proctor is required to take out an annual certificate. The general character and \* 687 nature \* of the office seems to be, that the proctor is to represent parties in judicial proceedings in the Courts in which he has been admitted as a proctor; but independently of the particular duties strictly incident to the office of proctor, persons holding that office (as is also the case with attornies and solicitors) perform various services more or less connected with the Courts of which they are officers; but many of those services and employments are wholly unconnected with any Court, — such as preparing letters of attorney, conveyances, settlements, and numerous other instruments.

The statute in question is entitled, "An Act for the better Regulation of Ecclesiastical Courts in Ireland." The 10th section says that, if any person not being a proctor shall, for profit or with a view to participate in the benefit to be derived from the office, functions, or practice of a proctor, either in his own name or in the name of any other person, do any act, matter, or thing whatsoever appertaining or belonging to the office, functions, or practice of a proctor, he shall forfeit 50*l*.

Now, in construing this clause, it is necessary to consider whether the legislature means to prohibit persons not being proctors from doing any acts which proctors might be in the habit of doing, but which are not incident to, nor form part of, the duties of the office of proctor, and which, prior to the statute, others as well as proctors might lawfully do; or whether the prohibition extended only to those acts and that business which properly was incidental to the office of proctor. The expression used is, "appertaining or belonging to the office, functions, or practice of a proctor." What is the correct meaning of these words, "appertaining or belonging"? I understand them to mean, "legally

incident to the office"; not any thing which proctors may think fit to do, but that which of legal right belongs to, or attaches to, their office. I am not aware that the word "appertaining" is to be found in any dictionary \* professing to give legal \* 688 definitions, or that it has acquired any peculiar meaning in the law; and I apprehend that it is used in the law, and must be so understood in statutes, in its ordinary and proper sense, where there is nothing in the context of the statute to extend or control it. In Johnson's Dictionary, the explanations given are, "to belong to as of right,—to belong to by nature or appointment,—that which belongs to any rank or dignity." And in every example given of its use it is connected with the matter to which it refers in the sense of right. There are several instances given of this application of it. It is, I conceive, used in this section, therefore, synonymously with the words which follow, "belonging to." Now, acts which before the statute were lawfully done by others, in common with proctors, could in no correct sense be said to belong to the office, functions, or practice of a proctor, the word "belong" implying that it belonged as of right and in an exclusive sense. The practice incident to the office or functions of a proctor seems to me to mean the practice of the Court of which the proctor is an officer, in the conduct of matters in which the proctor is officially concerned, and which Court it was the object of the statute to regulate. Such practice may, therefore, be ascertained; but the practice of proctors in any other sense will admit of considerable diversity; it will be found to vary in different localities, and not to be uniform in the same localities, and would, in fact, be very difficult of attainment, and is by far too undefined to be expected to be found in a penal statute. It appears by the evidence set out on the record in this case, that in some dioceses there are no proctors, and that when business occurs in which a proctor is required, a proctor is sent for from a distance. In such a locality, where there is no practice of a proctor because there is no such person within the diocese, the practice is to be learnt from another \* locality. The act which may \* 689 be in question may in some localities be done by proctors, in common with others who are not proctors, and in other places not done by proctors at all. In the diocese of Elphin, as I before mentioned, there are no proctors, and various acts are necessary to be done in that diocese in which no proctor, independently of

what is said to be the construction of this statute, is required, and all such business is to be done by the registrar or his deputies. It seems to me, therefore, that the words "appertaining or belonging" are words used in their proper sense and meaning, — that is, in the sense of rightly and exclusively belonging to the office of proctor. Besides the words "appertaining and belonging," the meaning of which I have just observed on, it must be noticed that the 10th section includes in the prohibition also the words "function or practice of a proctor," the meaning of which it becomes necessary likewise to consider. The question is, whether the words "function and practice" should be understood in the sense of the functions and practice legally incident to the discharge of the duties connected with the office of proctor, or whether they are used as intending to embrace the functions and practice not necessarily incident to the office, but such acts as those who filled the office were in the habit of exercising.

The observations I have made, in stating what I conceive to be the true construction of the words "appertaining or belonging to the office of a proctor" are applicable to this part of the case, and induce me to conclude that the words "functions or practice" are used in the restricted sense of functions and practice incident to the office, and that the statute professing to be an Act for the better regulation of the Ecclesiastical Courts, well justifies the conclusion that the subsequent regulations relate to the duties

of the officers of the Court, as such, rather than to the  
\* 690 incidental employment and \* business which any such officers may think fit to undertake for reward, in addition to their official duties, except where the terms of the statute impart a more extended meaning. If the construction which I have suggested is correct, then, as far as this section is to be considered, no information whatever is afforded by the legislature as to what acts, matters, or things do appertain or belong to the office, functions, or practice of a proctor; and in any action brought to recover a penalty which is alleged to have been incurred by a breach of this section, it would be by evidence alone that the Court and jury could be informed whether the act by which the forfeiture was said to be incurred did or did not fall within the terms of the prohibition; and such evidence would not only be receivable, but would constitute an essential part of the plaintiff's case; and if the plaintiff gave no such evidence, it would be the

duty of the Judge to direct the jury that, by the law, the verdict ought to be for the defendant. Supposing, therefore, that the true construction of the 10th section is to be collected from the terms of that section only, and that such construction is not affected by any other part of the statute, then the learned Judge was correct in law in receiving the evidence which was excepted to, and the Court was right in affirming the judgment pronounced upon the verdict for the defendant, which was given in pursuance of the Judge's direction; and in that case the judgment of the Court below ought to be affirmed.

But the main argument in the Court below was, and has been at your Lordships' bar, that the true construction of the 10th section is not to be collected from the terms of that section only, but that the 10th section must be construed in connection with the 9th section; and the objection to the admissibility of the evidence of the usage and practice of the registrars, as well before as since the statute, to \* do the several acts set forth \* 691 in the different counts of the declaration, arises out of the 9th section; and it is said that the 9th section declares that "the obtaining probates of wills, letters of administration, or marriage licenses" are acts which appertain or belong to the office of a proctor, and therefore that the evidence of usage by the registrars to do those acts was irrelevant, because no usage could render that lawful which the statute prohibited. It therefore becomes necessary to refer to the language of the 9th section.

The 9th section prohibits proctors from using or suffering their names to be used for the profit of others, in any suit, the prosecution or defence whereof appertains to the office of a proctor, or in obtaining probates of wills, letters of administration, or marriage licenses. The question which is raised upon this section is, whether the words, "appertain to the office of a proctor," apply as well to the sentence which follows them, viz. "or in obtaining probates of wills, letters of administration, or marriage licenses," or apply only to the prosecution and defence of the suits previously mentioned?

In considering this question, it must be observed that the word "appertain," as used in this section, is here connected only with the words "office of proctor"; and it is proved by the evidence that, prior to the statute, the probates of wills, letters of administration, or marriage licenses, were acts done by other persons than

proctors, and that, in truth, those acts do not appertain to the office of proctor, according to what I understand to be the meaning of that word. Supposing, therefore, the legislature to have declared and enacted, as is contended on the part of the plaintiff, that they did so appertain; although the statute might be binding for the

future, yet the enactment, according to the evidence,

\* 692 \* would have added new incidents to the office of proctor, which is more than it professed to do.

It is material to observe, however, the position of the words that are under consideration. The words are well satisfied, by being applied to the suits which are mentioned immediately before; and it seems to me that the position of the words tends to show caution in the legislature to exclude the construction contended for, rather than to warrant it. If the word "appertain" was intended to apply to the obtaining of probates of wills, letters of administration, and marriage licenses, the natural position of the words "appertain to the office" would have been after the enumeration of all the matters intended to be comprised within it, and not in the middle of the enumeration, where it is placed; and, except for the high authority which has taken a contrary view, I should have thought it plain that the structure of the section manifested, that although proctors were prohibited from using or lending their names for the benefit of others in obtaining probates of wills, letters of administration, and marriage licenses, yet that those acts were not understood by the legislature, still less intended to be declared by it, as appertaining to the office of a proctor.

That the prohibition in the 10th section upon persons acting as proctors was not intended to be coextensive with the prohibition in the 9th section against the proctor lending his name for the benefit of others in matters relating to suits, the prosecution and defence whereof appertain to the office of proctor, or in obtaining probates of wills, letters of administration, or marriage licenses, may easily be understood. There might be good reason why the legislature should prohibit proctors from lending their names for the benefit of others, in certain acts or business done by them, beyond,

\* 693 and independently of, their office of proctor, such \* as obtaining probates of wills, letters of administration, and marriage licenses. There are many matters connected with the proof of wills, and obtaining letters of administration and marriage licenses, requiring circumspection in the officers connected

with the departments in which those proceedings are conducted, and which circumspection might be exercised with much less care when the proceedings were conducted by, or at all events in the name of, a known practitioner in the Courts, and having the security of his position and character, than when they came and were sought to be transacted in the names of unknown persons. And it is a notorious fact that, in England, individuals of very low station were in the habit of looking out in the neighbourhood of public offices, where the business of proving wills and obtaining administrations and marriage licenses is transacted, for persons inquiring for such offices, or from whose appearance it was suspected that they had occasion for such business to be done; and, under pretence of taking them to such public offices, they were often really taken to the offices of persons using the names of proctors, who made the men who brought them thither certain allowances. About one year before this statute for Ireland passed, a statute was passed regulating the ecclesiastical offices in England, containing very much the same clauses, and it is highly probable that in the Irish statute the same forms were adopted as in the English Act. The same evil had probably given rise to the same remedial legislation in both countries.

Believing from the evidence, that the acts did not, before the statute, in any correct sense appertain to the office of proctor, and also attending to the form and language of the section itself, I entertain a very strong opinion that there is no sufficient ground to warrant the construction that the 9th section was intended as a legislative declaration \* that the acts referred to did, be- \* 694 fore the statute, appertain to the office of proctor, or that they should be deemed to appertain to it after the passing of the statute.

It should, however, be remarked, that an important observation may be made against what appears to me to be the true construction of the statute. It is said, if the obtaining of probates, letters of administration, and marriage licenses was not declared to appertain or belong to the office, function, or practice of a proctor, and that the statute did not intend to prohibit others than proctors from doing that business, either in the names of others or in their own names, why did the statute prohibit proctors from using or lending their names in such businesses? And it is said that the effect of the construction I have suggested leaves it open to per-

sons to use the name of a proctor in the doing of the business referred to, without being subject to a penalty under this statute, when proctors are prohibited from using or lending their names in the same business for the benefit of others. In reference to this remark, the statute may not unreasonably have prohibited persons, not proctors, from doing any acts which by law ought to be done by proctors, and have left the fact of doing in another person's name what they might lawfully do in their own names to the existing law, under the impression that, where a proctor was not only deprived of all motive for sanctioning such conduct, but would have every motive for preventing it, the practice would not be sufficiently extensive to require special penal enactments. It is consistent with the title of the statute to confine its penal enactment to the business of the Courts, and such other special matters, without going further in a general penal enactment against *men* obtaining money by pretending to be what they are not, or to be acting for others in doing business where they have no deriv-

\* 695 ative authority. Admitting, however, the force of this \* remark, I still think that, in construing this penal section by itself, the acts complained of are not within its prohibition, and that the true construction of the 9th section shows that it was not intended as a legislative declaration that the acts complained of did appertain to the office of a proctor, and therefore that the 9th does not control and govern the construction of the 10th section.

The Judges seem to have differed in opinion with regard to the meaning of the section, although they came, in the proportionate number I have mentioned, to the opposite conclusion. Mr. Justice Maule seems to be of opinion that the obtaining these instruments — probates and marriage licenses — would be considered as doing acts appertaining to the office, functions, or practice of a proctor, provided they were done in a fictitious name. By fictitious, I mean other than the name of the person who really did the act, but that they might be lawfully done where the party did them in his own name. His conclusion, therefore, although upon a ground rather peculiar to his own view, is, that the judgment ought to be affirmed. The other Judges took a somewhat different view of the subject; but the result of their opinion is what I have stated.

It may be observed that the practice of proctors may hereafter embrace other descriptions of business than what they now per-

form, and if the word "practice" does not mean practice properly and legally incident to the office of proctor, but means all that proctors are or may be in the habit of doing, the monopoly may be extended very widely, including conveyancing, marriage settlements, partnership deeds, charter parties, awards, and numerous other documents, some of which many proctors are already accustomed to prepare.

I therefore submit to your Lordships that the evidence excepted against was properly received, and that the direction \* of the learned Judge to the jury, which is also matter of \* 696 exception, was correct, and therefore that the judgment ought to be affirmed.

I should mention that it is a matter of great satisfaction to me that the noble and learned Lord, now present, attended during the argument, and gave me the benefit of his assistance in the consideration of this case; and I have, as far as possible, endeavoured to embody in what I have said his view as well as my own, which I have no reason to suppose at all differs from mine.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the conclusion at which he has arrived, and also in the argument by which he has supported that opinion. When the case came before your Lordships last session, I stated that I was very much moved by the opinion of the very learned person, now Lord Chancellor of Ireland, but then Chief Justice Blackburne. I have since reconsidered that opinion, as well as the opinion of the two learned Judges, his brethren, who concurred with him in it, and, on the whole, I have come to a very clear conclusion, agreeing with my noble and learned friend, and with those learned Judges. Although Baron Martin did not give his opinion to the House, yet he attended and joined in the opinion of Mr. Justice Maule, Mr. Justice Talfourd, Mr. Justice Williams, and Mr. Justice Erle. Those learned Judges came to the same conclusion, although not exactly by the same means, nor exactly by the same rules; but, upon the whole, they entirely agree in answering the two questions put to them by your Lordships, one in the affirmative, and the other in the negative. I have also, with my noble and learned friend, well considered the arguments of the learned Judges on the other side; and, after \* giving the utmost attention in my power to their argu- \* 697



ments, I am still of opinion that the judgment below ought to be affirmed.

I do not know whether it is worth setting right an error which I find has crept into the copy of your Lordships' paper containing the learned Judges' opinions,<sup>1</sup> as to what passed when one of the Judges (Baron Alderson) was allowed by special permission to read the opinion of Mr. Justice Coleridge. It is there said, referring to the *Bethnal Green Case*, that I used these words: "In which there was great difference of opinion in the Exchequer Chamber, and in which case we had the benefit of having the manuscript judgments of those learned persons, which were not used in moving the judgment of your Lordships." It was I that moved that judgment, and I have a very distinct recollection of having very great difficulty and embarrassment from the conflicting opinions of those learned Judges. But I am quite confident, instead of saying they were not used in moving the judgments of your Lordships, it ought to have been distinctly, that they were used, and great reliance was placed on the arguments of some of those learned Judges. I am quite certain that those judgments were used in the course of that argument.

*Judgment of the Court below affirmed, with costs.*<sup>2</sup>

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\*MARTIN v. D'ARCY.

1852. March 30.

ANDREW PERSSE MARTIN, *Appellant*.DOMINIC D'ARCY and WILLIAM ARMSTRONG, *Respondents*.*Dismissal of Appeal. Costs.*

In an appeal from a decree in the Court of Chancery in Ireland, where no one appeared for the appellant, but counsel did appear for the respondents, the appeal was, without the respondents' counsel being called on, dismissed with costs.<sup>3</sup>

<sup>1</sup> See Lord Brougham's observations printed from this paper, ante, p. 666.

<sup>2</sup> Lords' Journals, 16th June, 1852, p. 263.

<sup>3</sup> See *Smith v. Durant*, 9 House of Lords Cases, 192.

THIS was an appeal against a decree of the Court of Chancery in Ireland. When the case was called on,—

*Mr. Keogh* appeared for the respondents, and prayed that the judgment might be affirmed and the appeal dismissed. No one appeared for the appellant.

THE LORD CHANCELLOR, without calling on the respondents' counsel to state the nature of the case, moved that the appeal should be dismissed, with costs.

*Ordered accordingly.*<sup>1</sup>

HENDERSON v. SANDERSON.

1852. June 3.

JOHN HENDERSON and others, *Appellants*.

JAMES SANDERSON, *Respondent*.

*[Joint Stock Company. Contributory. Date of his Liability.]*

The name of a person who had purchased shares in a joint stock bank was, after the stoppage of that bank, placed on the list of contributories, but only from the date at which he made the purchase. An appeal was presented by the official managers against this qualification of his liability. When the case was called on, this qualification was, by agreement, struck out, and the order of the Court below varied in that respect.

In this case Vice-Chancellor Knight Bruce made, on the 7th July, 1849, an order by which Mr. Sanderson's name \* was retained on the list of contributories to the North of \* 699 England Joint Stock Banking Company, but only from the 28th of January, 1847, the date of the contract by which he had become the purchaser of fifty shares belonging to a person deceased.

The Vice-Chancellor in giving judgment said: "However the law may be as to creditors, I apprehend that, as between the parties themselves, this gentleman is only liable for losses from the 28th of January, 1847."<sup>2</sup> The appellants were the official managers of the company, and their petition of appeal prayed that "the name of the said James Sanderson ought to be retained on

<sup>1</sup> Lords' Journals, 30th March, 1852.

<sup>2</sup> 3 De Gex & Smale, 66, 78.

the said list of contributories without any qualification." Mr. Sanderson presented a cross appeal, praying that his name *might* be altogether struck out of the list of contributories, on a ground on which he rested his case at the hearing, that the contract of sale had not been completed. When the case was called on, —

*Mr. Prior* appeared on behalf of the appellants, and announced that by agreement between the parties the cross appeal was to be dismissed, and the original appeal allowed.

An order was accordingly made directing that the order of the Court below should be varied by leaving out the qualification restricting the liability of Sanderson to the date of his purchase of the shares.<sup>1</sup>

\* 700

\* JONES v. CANNOCK.

1852. June 5.

ELIZABETH JONES, *Plaintiff in error.*SAMUEL CANNOCK,\* *Defendant in error.**Covenant. Practice. Costs.*

A lease contained a covenant by the lessor to do certain work, and at the end of the covenant were these words: "And the whole of which is agreed to be left to the superintendence of the defendant and the plaintiff's son": —

*Held*, that this was neither a condition precedent to, nor concurrent with, the covenant.

In a writ of error where no one appeared for the plaintiff in error, the counsel for the defendant in error was required to state the nature of the case, and the judgment of the Court below was then affirmed, with costs.\*

THIS was a writ of error on a judgment of the Court of Exchequer Chamber. Cannock brought an action of covenant against Jones on a former lease, which contained two clauses as to the repair of the premises. By the first, Cannock engaged to keep the premises in repair "when and so often as occasion shall require, the said farm-house and buildings being previously put in repair and kept in repair by the said E. J." The second clause

<sup>1</sup> Lords' Journals, 3d June, 1852.

\* See *Smith v. Durant*, 9 House of Lords Cases, 192.

was as follows : "The said Elizabeth Jones shall and will, within eighteen months from the date of the lease, erect and build a new shed and stalls for feeding cattle, complete, at the upper end of the barn, &c., and the whole of which is agreed to be left to the superintendence of the said S. Cannock and Edwin Jones her (*sic*) son." The Court of Exchequer held that the concluding words of the first clause amounted to an absolute and independent covenant on the part of Elizabeth Jones to put the premises into repair, and that the provision in the second clause, that the work should be left to the superintendence of Cannock and of the son of Elizabeth \* Jones, was not a condition precedent \* 701 to, or concurrent with, the covenant by her to do the work covenanted for in the previous clause.<sup>1</sup> On error the Court of Exchequer Chamber affirmed this decision.<sup>2</sup>

When the case was called on in this House, —

*Mr. Keating* and *Mr. Gray* appeared for the defendant in error. No one appeared for the plaintiff in error, and they prayed the judgment of the House.

THE LORD CHANCELLOR directed the counsel to state the nature of the case.

*Mr. Keating* did so, after which, —

THE LORD CHANCELLOR said. — My Lords, the plaintiff in error does not appear at your Lordships' bar to support the case which she has brought before you. The only question, therefore, for the House is this, whether your Lordships will, according to the modern precedents, affirm the judgment of the Court below, or, according to a more ancient one, simply dismiss the appeal. It is for that reason that I have heard the short opening of the case, not with a view of forming any absolute decision upon it, but for the purpose of informing my own mind, and communicating judicially to your Lordships my opinion whether, on the part of the plaintiff in error, there is any case in point of law. I am of opinion that there is not. I shall therefore move your Lordships, not simply to dismiss the appeal, but to affirm the judgment of the Court below.

<sup>1</sup> 3 Exch. 233.

<sup>2</sup> 5 Exch. 713.

1852. June 17, 18, 22.

FREDERICK MANGLES and others, *Appellants*.WILLIAM DIXON and others, *Respondents*.

*Chose in Action, Assignment of. Equities upon. Disclosing Facts.  
Charter Party.*

The assignee of a chose in action, or security of any kind, where there has been no fraud, stands in exactly the same situation as the assignor as to the equities arising upon it. He must be taken to be cognizant of them. It is his *duty* to make inquiries, and, as a general rule, the creator of the security thus assigned is not bound, on receiving a simple notice of the assignment, to volunteer information. If a loss arises, it falls upon him whose duty it is to make the inquiries and who has not made them.

But if the notice given by the assignee discloses, on the face of it, that which induces the belief that he has been deceived in accepting the assignment, the creator of the security is bound to inform the assignee of the real circumstances, and if he should not do so, he will be bound to perform the stipulations of the security, and cannot be allowed to take advantage of the equities existing as between the assignor and himself.

The performance, by the creator of a security, of any intermediate stipulations in it, after he has received notice of its assignment, being an act done under both a legal and an equitable liability, can never, in itself, be considered as a ground for fixing him with a liability to something beyond that by which he is equitably bound.

A. was the owner of a vessel. B. was to charter it for a particular voyage to seek a particular cargo. Its tonnage was larger than B. required. A. was willing to undertake half the risk, and was to have half the profits. A charter party was executed, on the 24th of April, 1845, by which the vessel was declared to be let to freight, at 16s. a ton per month, to B., and bills were to be given, and payments from time to time made, by B., which, taken together, would cover one half of the amount stipulated for the freight. On the arrival of the ship at home, B. was to give a bill at ninety days' date for the remainder of the freight. Two other instruments were executed on the same day; by the first of which A.'s clerk was to join in the adventure, and, "after payment or deduction of the freight, and all incidental expenses, the profit or loss"

\* 703 was to be borne by the parties in equal moieties; and by the other \* A. gave to B. a guarantee for the due performance, by the clerk, of the stipulations he had entered into. On the 1st of December, 1845, while the ship was on the voyage, A. assigned to C. the charter party, and wrote on the margin thereof a note addressed to B., requesting him to pay "what is due." C. gave B. notice of this assignment and note. The notice was in the ordinary

form, and C. made no inquiries of B. B. continued the payments which, by the stipulations in the charter party, he was bound to make. The vessel returned in August, 1846, and the adventure turned out a loss. B. claimed, as against C., to balance the accounts of profit and loss, as he would have been entitled to do with A. had the charter party not been assigned : —  
*Held*, that in equity he was entitled to do so.

THIS was an appeal against a decree of Lord Chancellor Cottenham, which had reversed a previous decree of Vice-Chancellor Knight Bruce.

The appellants were merchants in the city of London, and in the month of April, 1845, through their agent, entered into a contract of charter party with the agent of Messrs. Boyd and Co., who were shipowners, for the use of a vessel called the *Fifeshire*, of 463 tons burden, for a voyage to bring home a cargo of guano. The charter party, which was dated on the 23d, but was executed on the 24th April, 1845, declared that the "charterers agree to hire the said vessel for the term of six calendar months from the time of the ship being ready to sail," and for such further term as the charterers should think proper, not exceeding eighteen months in the whole, on certain conditions. "That the charterers shall possess the entire and exclusive use of the whole reach and burden of the vessel," with the exception of what was necessary for the use of the master and crew ; "that the freight, &c. shall be for and payable to the charterers, or their order" ; that "the charterers shall be at liberty to, send a supercargo," &c., &c. ; and then came \* the following stipulation : "In con- \*704 sideration of the foregoing, the charterers agree to pay, or cause to be paid, to the captain or owner of the said vessel, at and after the rate of 16s. per ton, old register measurement, per calendar month, and in like proportion for any fractional parts thereof, until the final discharge at a port in the United Kingdom ; the payment for victualling the men is to continue as long as they are on board ; the freight to be paid as follows : say, 400*l.* by the owners' draft on the charterers, payable at four months' date from the time of the vessel being ready to proceed from Liverpool ; the further sum of 600*l.* at the expiration of four months from the date of the ship sailing, by a like draft of the owners on the charterers at four months' date ; and a further sum of 150*l.* in cash at the expiration of eight months from the time of sailing ; and a like payment of 150*l.* at the expiration of every succeeding

month until the termination of the employment of the ship; and the remainder, on unloading and right delivery of the cargo in the United Kingdom, by a good and approved bill on London at ninety days' date, or cash equal thereto." The charterers were to pay all port charges, &c.

Two other instruments were executed at the same time; the first of which was a memorandum, in the following terms: "Memorandum, that Messrs. Mangles, Price, and Moore having, by a charter party dated the 23d April instant, hired the ship *Fifeshire* for the term and at the freight therein mentioned, it is hereby agreed between them and Mr. G. J. Ashton, that the trading which shall be carried on, and all cargo and produce which shall be sent on board the said ship in pursuance of the said charter party, and all benefits and advantages which shall be derived therefrom, shall be for and upon the joint account and risk of the said Mangles, Price, and Moore of the one part, \* 705 and \* the said G. J. Ashton of the other part, in equal proportions, and that after payment or deduction of the freight and all incidental expenses, the profits or loss which shall arise shall be borne and received or paid by the said parties in equal moieties." This memorandum was signed by G. J. Ashton.

The second of these papers, dated on the same day, was a guarantie given by Boyd and Co. for the due performance of the memorandum of agreement thus entered into by Ashton, that agreement being, in fact, entered into by him on their behalf. The guarantie was in the following terms: "To Messrs. Mangles and Co. Gentlemen,—In consideration of your having agreed with Mr. George Joseph Ashton that he shall be entitled to one moiety of the profits to be earned by you in trading with the ship *Fifeshire*, in pursuance of the charter party entered into between you and ourselves (Mr. George Joseph Ashton also bearing one moiety of the expenses and loss, if any, attending the same), we hereby jointly and severally guarantee and undertake and agree, from time to time, and at all times hereafter, to save you harmless, and indemnify you and each of you from and against the part or share of all such charges, expenses, and loss, as may be sustained or happen in the course of such trading, which Mr. George Joseph Ashton, by virtue of your agreement with him, would be liable and ought to pay; and also undertake and agree, from time to time, when required, to repay and reimburse to you and each

of you all and every sums and sum of money which you or either of you may pay or be liable to pay for or by reason of the nonpayment by Mr. George Joseph Ashton of his moiety or share of all such charges and expenses and loss, or any part thereof." This guarantie was signed by Boyd, on behalf of himself and partners.

\* The appellants paid the sums of money stipulated in the \* 706 charter party and accruing due before the 14th of March, 1846, on which day they received a notice from the respondents that, on the 1st of December, 1845, the charter party had been deposited with them by Boyd and Co. "for a valuable consideration in money, and the said Boyd and Co. did on that day authorise you to pay us the amount of all monies then due, or thereafter to become due, on the said charter party"; and the respondents thereby required the appellants to pay the same. This notice was accompanied by a copy of an order of the date of the 1st of December, 1845, made on the margin of the charter party, and signed by Boyd and Co., which order was in the following terms: "Messrs. Mangles and Co. Please pay the amount of what is due from this date to Messrs. Dixon and Co., or their order." A monthly instalment became due on the 1st of May, 1846. It was duly demanded by the respondents' solicitor; and after some hesitation in paying it, on the ground that Boyd and Co. were then insolvent, and that the money might be demanded from the appellants by the assignees, it was paid, and a stamped receipt asked for and given. The June and July instalments were voluntarily paid.

On the 17th of August, 1846, the *Fifeshire* arrived in London, and was taken possession of by the appellants, who sold the cargo. It was then discovered that the adventure had terminated in a loss, and the appellants delivered the accounts showing the loss, and contended that Boyd and Co. were liable for a moiety thereof, and offered to make up the accounts with the respondents on that footing. The respondents refused to accede to this arrangement of the business, and brought an action in the Court of Exchequer in the name of Boyd and Co. to recover the balance of the whole freight due upon the charter party; in which action a verdict and \* judgment were recovered, and the money paid.<sup>1</sup> \* 707. On the 24th of February, 1847, the appellants filed their bill in Chancery against the respondents, and Boyd and Co. and

<sup>1</sup> 16 Meeson & Welsby, 337, 3 Exch. 387.



their assignees, in which they set forth the whole of these matters, and prayed that the accounts might be taken in respect of the partnership or joint adventure between the appellants and Boyd and Co., and that it might be declared that Dixon and Co., in respect of their assignment of the charter party, were only entitled to stand in the place of Boyd and Co. upon the footing of the agreement between the appellants and that firm, and for an injunction as to the action and the judgment thereon.

The respondents in their answer denied all knowledge and notice of the agreement of Ashton and the guarantie of Boyd and Co., and insisted that, by virtue of the charter party, and the assignment thereof to them, and the order written in the margin thereof, they were entitled to the whole freight. They set forth that, on the 29th of May, 1845, they advanced to Boyd and Co. the sum of 12,000*l.* on their promissory note of that date, payable with interest on demand; that there being on the 1st of December, 1845, a balance of 11,000*l.* and interest due, Boyd and Co., as a security to them, assigned the charter party to them, and that on the 14th of March, 1846, they gave to Mangles and Co. notice of such assignment.

On the 28th of June, 1848, the cause was heard before Vice-Chancellor Knight Bruce, who made a decree in favour of the appellants. An appeal was thereupon taken to Lord Chancellor Cottenham, who reversed the decree, and ordered that the appellants' bill should be dismissed with costs.<sup>1</sup> The present appeal was then brought to this House.

\*708     \* *Mr. Rolt and Mr. J. Bailey (Mr. Josiah Smith was with them)* for the appellants. — The judgment of the Court below proceeds on an entire misapprehension of the facts, and of the equities to which they give rise. The contract between Mangles and Co. and Boyd and Co. consisted not of the charter party alone, but of three instruments, all executed at the same time. On the 1st of December, 1845, Boyd and Co. deposited the charter party with Dixon and Co. as a security in respect of an antecedent debt of 12,000*l.*, not as a valuable instrument on which future advances were to be made. The judgment of the Court below is erroneous in assuming that the money was borrowed for the purpose of this joint adventure. There is not one

<sup>1</sup> 1 Macnaghten & Gordon, 437.

particle of evidence to warrant such an assumption. Dixons, having this charter-party in their possession, gave Mangles no notice of the fact until the 14th of March, 1846. Up to that time, the instalments had been regularly paid by Mangles and Co. to Boyd and Co. On receiving the notice of the deposit, Mangles and Co. inquired into the matter, and finding the deposit to be regular, paid the monthly instalment of 150*l.*, and afterwards paid two others. The ship arrived in August, and then Mangles and Co. proceeded to make out the accounts of the joint adventure. From the first this was a joint adventure, for the ship was too large for the purposes of Mangles and Co.; and therefore the two brokers, in whose hands the matter was left, arranged the form in which the business should be managed, and arranged it under the advice of their respective solicitors, in order that every thing might be correct in point of law. What they did was afterwards expressly authenticated by the signature of Boyd and Co. The depositions of the two brokers expressly establish these facts. There was no desire that this should be a secret transaction, nor ought the law to be administered against the appellants on the opposite supposition. The instalments paid were those which, in any event, were due from the appellants, and there is consequently nothing in those payments at all inconsistent with the appellants' representation of the transaction. The respondents saw the provisions of the charter party, which was left in their hands, and must have observed that the payments made only amounted to half the sum therein mentioned as the monthly amount of the freight, and yet they never made any inquiry upon the subject, nor offered the least objection as to the amount. With the means of knowledge in their hands, they acquiesced in what was done in a manner quite incompatible with the belief that they thought themselves entitled to the full amount of freight stated on the face of the charter party. They must have believed, if they did not actually know, that there was another agreement, which qualified and controlled the stipulations of the charter party.

There is no suggestion, in any part of the answer, that the respondents could have improved their position, had they, at any time before the arrival of the ship, received from the appellants a full statement of all the agreements. In what respect, therefore, is it possible for them to set up a claim of equities on account of

the absence of such a statement? It is plain that the assignee of a chose in action takes it subject to all existing equities: *Coles v. Jones*.<sup>1</sup> That is the case of the assignee of a bond; and yet a bond is a positive and absolute stipulation to do an act, or to pay a sum of money, apparently subject to no condition but what is stated on the face of the bond. *Turton v. Benson*<sup>2</sup> is to the same effect. It is for the assignee to show any special circumstances which take him out of the operation of that rule. None  
 \* 710 such exists here. The \* giving to the appellants notice of the assignment did not impose on them the obligation to give notice of their existing equities. If they wanted information, they were bound to make the inquiry, — they had ample materials to put them on making the inquiry.

[THE LORD CHANCELLOR. — Have they not a right to say that you ought to have informed them of the equities?]

That might be so if any new liability was sought to be imposed on them. But that is not so here. The appellants admit that 1379*l.* are due, and the Vice-Chancellor's decree was made for payment of that amount. They ought to have inquired, and their rights, to some degree, depend on the particularity of their inquiry; *Ibbotson v. Rhodes*,<sup>3</sup> where an issue was directed to try what was the information given when the inquiry was made. Lord Cottenham, in the present case, assumed<sup>4</sup> that "it was agreed between Boyd and Co. and Mangles and Co. that the adventure should be on the joint account of those two houses, — that this arrangement was intended to be secret"; and that "it was for that purpose made in the first instance between Mangles and Co. and Mr. Ashton, a clerk of Boyd and Co.";<sup>5</sup> and then his Lordship supposes that the 12,000*l.*, for which this charter party was deposited as a security, might have been borrowed for "the purposes of the joint adventure." There is not a trace of proof in the evidence to justify these conjectures, and yet it is clear that Lord Cottenham's application of the rules of equity was mainly influenced by this supposition of secrecy and concealment. Thus he says:<sup>6</sup> "They therefore put into the hands of Boyd and Co. the means of imposing upon others, not merely by concealing their own right, but by declaring that they had no such right,

<sup>1</sup> 2 Vernon, 692.

<sup>2</sup> 2 Vernon, 764, 1 P. Wms. 496.

<sup>3</sup> 2 Vernon, 554.

<sup>4</sup> 1 Macnaghten & Gordon, 445.

<sup>5</sup> 1 Macnaghten & Gordon, 446.

but that the whole \*belonged to Boyd and Co." There \*711 was no concealment; the whole matter was left in the hands of the brokers, who did what they thought was necessary to charter the ship in due form, and to secure to Boyd and Co. a power of participating in what was expected to be a profitable adventure.

Lord Cottenham then says:<sup>1</sup> "It is a well-known rule, that a party, having a secret equity, who stands by and permits the apparent owner to deal with others as if he was absolute owner, and as if there was no such secret equity, shall not be permitted to assert such secret equity against a title founded upon such apparent ownership." This rule is not applicable here, for the appellants did not stand by and allow the respondents to advance their money on any such supposed ownership. The appellants knew nothing of the transactions between Boyd and Co. and the respondents, until the latter gave notice that they stood in the situation of Boyd and Co. with respect to the money due from the appellants. The freight was not assigned to the respondents independently of the equities to which the assignors were liable. The circumstances of this case resemble those of *Cator v. Burke*,<sup>2</sup> where the attempt to do what is done here was met by Lord Loughborough with the remark, that it was "turning an unassignable into an assignable security." In *Beckett v. Cordley*,<sup>3</sup> Lord Thurlow, reviewing the cases upon this subject, said:<sup>4</sup> "There is no case in the books but where the party to whom the fraud is imputed was conusant of the treaty in which the fraud was practised." That was not the case here, nor is there the least proof of any intention to commit a fraud, or even to do any thing in a secret manner. The case of *Priddy v. Rose*<sup>5</sup> very much resembles the present in many circumstances, \*and there Sir W. Grant said:<sup>6</sup> "Why is a third person, \*712 who asked no question upon the subject, and gave no notice of his having any interest in the matter, to tell the trustees that it was their duty towards him to have called in the debt sooner? . . . The person proposing to take the assignment could ask the trustees whether that money was paid; but the trustees had no opportunity of apprising him that it was not paid, for they knew noth-

<sup>1</sup> 1 Macnaghten & Gordon, 446.

<sup>2</sup> 1 Brown, C. C. 434.

<sup>3</sup> 1 Brown, C. C. 353.

<sup>4</sup> 1 Brown, C. C. 357.

<sup>5</sup> 3 Merivale, 86.

<sup>6</sup> 3 Merivale, 107.

ing of the transaction. They have been guilty of no bad faith towards the plaintiffs; but the plaintiffs have been wanting in common prudence in not consulting the trustees before they took the assignment." There is no rule of law which lays it down that a person merely receiving notice of an assignment is bound to communicate to the assignee all the transactions relating to it between himself and the assignor. The assignor ought to inquire, and if he does not, then, in a case like this, where there is no pretence for imputing fraud, he must suffer the consequence of his own negligence.

*Mr. Purton Cooper* and *Mr. Daniell*, for the respondents. — There can be no doubt that the name of Ashton was used as the representative of the appellants; and the effect at law of the deposit of the charter party, and of the notice to the appellants has already been declared.<sup>1</sup> It is clear that Messrs. Dixon are entitled at law to the whole freight. Then arises the question, whether there is any equity stated in the bill to induce the Court of Chancery to interfere and prevent them from obtaining the benefit of their legal rights. There are two equities stated in the bill. The first is, that if the effect of this instrument was to entitle Boyd and Co., or their assignees, or the persons

\* 713 \* claiming under them, to recover the whole of the freight, or more than half, that was a mistake as to the intentions of the parties which equity could correct; but equity will not correct such a mistake, if the appellants have acquiesced in *Boyd and Co.* so dealing with the instrument, especially as regards persons who have had no notice of the mistake, and if the instrument itself has been assigned for a valuable consideration. The other equity is, that this was a joint adventure both as to profit and freight, and that *Boyd and Co.* might, on a settlement of accounts, have to refund; but to that the answer is, that *Dixons* cannot be affected with a possible liability of *Boyd's*, of which they had no notice, and which was not in accordance with the terms of the instruments assigned to them. This equity could not arise until after the sale of the cargo; and the title to the payment of freight arose immediately upon the ship's arrival.

[THE LORD CHANCELLOR. — There could not be any other way of effectuating this agreement for the division of the freight than that

<sup>1</sup> 16 Meeson & Welsby, 337, 3 Exch. 387.

which has been adopted. You do not import the second or third agreement into the first. They all constitute but one agreement.]

The Court of Exchequer thought otherwise, and held that the payment of the freight was an absolute stipulation under the charter party, and must be made without waiting for the result of the speculation under the agreement and guarantie. As to the facts of this case, it is clear that Messrs. Dixon, by their notice of the 14th of March, demanded not half, but the whole of the freight; and this was the character of their claim throughout. Even assuming Dixon and Co. to stand in the position of Boyd and Co., it is clear that the latter would have had a right on the arrival of the vessel to demand a bill for the freight; and if that bill had been refused, Boyd and Co. would \* have had an action for dam- \* 714  
ages; and it would have been no answer to that action to say that the adventure was a joint adventure, which, when wound up, would probably turn out to be a loss. In such a case, on a bill filed stating the joint speculation and the loss, equity would not recognise that loss, which, in fact, might constitute a cross demand, but would not be a set off in equity against a clear demand at law; and a Court of Equity would not interfere. *Rawson v. Samuel*.<sup>1</sup> A Court of Equity will not interfere, on the ground of an equitable set off, to prevent a party from recovering on a breach of contract, though such cross demand may arise out of the contract, the breach of which is the subject of the action.

The grounds on which Lord Cottenham decided this case were these,—any equity arising from mistake was abandoned. It is shown by a high authority,<sup>2</sup> that “if a person, having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right.” Here the appellants, by allowing Boyd and Co. to hold a charter party, which apparently gave them a right to the whole of the freight, had permitted them to appear to have a legal title, and to deal on the footing of that legal title; and having so acted, and in that way “permitted or encouraged” the respondents to accept this charter party as a security for the whole freight, they cannot now escape from the consequences of their own act.

<sup>1</sup> Craig & Phillips, 161.

<sup>2</sup> Vendors & Purchasers, 7 ed. (1826), p. 717. This statement is repeated in the “Concise and Practical View of the Law of Vendors and Purchasers” (ed. 1851), 591.

The respondents, in their answer in the Court below, spoke to a conversation in which one of the appellants had said that if the ship had brought home a cargo of nitrate of soda, instead of guano, they would have heard nothing about the agreement \*715 with Ashton; in other words, saying, that if the adventure had been one of profit, instead of loss, the full freight would have been paid without remark, — an allegation which, being quite uncontradicted by the evidence, fully justified the observations made by the Lord Chancellor in the Court below. In *Steed v. Whitaker*,<sup>1</sup> Lord Hardwicke refused to set up an encumbrance against a settlement, because the encumbrancer, a mortgagee, had lain by and allowed the party entitled under the settlement to build upon the land without giving him notice of the mortgage. A similar principle was acted on in *Troughton v. Gütley*.<sup>2</sup>

In *Joyce v. De Moleyns*,<sup>3</sup> it was held, that if a man advanced money, and without notice accepted as security the deeds of an estate, though the person who so gave them to him had no title thus to dispose of them, yet, having the apparent ownership, and the other *bonâ fide* taking them, the possession of them by the person so *bonâ fide* taking them as security for his advances would be protected by the Court. These cases apply to and furnish the principle which must govern the decision of the present case. The judgment of the Court below proceeded on the ground that the appellants were aware, in March, 1846, that the respondents claimed the whole of the freight, and they did not then intimate that there was any secret partnership which entitled Boyd and Co. to but one half of it. The decree, therefore, was founded on the transactions between the parties, and was warranted by the evidence as it was by the pleadings. The appellants cannot be heard to say, as against Dixon and Co., that there was any other agreement in existence with regard to the freight than that which appeared on the face of the charter party. The same defence \*716 against the liability of these appellants was in substance \*set up in the Exchequer as in Chancery, but it was in effect overruled in both. The Court of Exchequer said that the agreements were not single, but severable; and the judgment of Baron Parke was particularly addressed to that point. The argument in the Court of Exchequer took place after the argument before

<sup>1</sup> Barnardiston, Ch. Cas. 220.

<sup>2</sup> 2 Jones & La Touche, 376.

<sup>3</sup> Ambler, 630.

Lord Cottenham, but before he pronounced his judgment, and the Judges in both Courts came to the same conclusion ; and there can be no doubt that they were well warranted in so doing, for the evidence of Moore and Ashton shows that the intention was that this charter party should confer legal rights, and that the guarantie and the charter party must be construed as different instruments. The Dixons, as the holders of this charter party, were entitled to the full freight, notwithstanding any private arrangement between Mangles and the Boyds. It is clear that Mangles and Co. were bound, on the arrival of the vessel, to accept a bill for the freight due upon the charter party. Had they done so, they could not afterwards have proceeded in chancery to restrain an action on their acceptance, upon the ground of the existence of the collateral agreement ; the bill would have been negotiable, and would have been enforceable in the hands of a third person : *Burrough v. Moss*,<sup>1</sup> where it was decided that the indorsee of a negotiable instrument, though liable to all the equities on the face of the instrument itself, is not liable to others which are collateral to it.<sup>2</sup>

[THE LORD CHANCELLOR. — The bill alleges that the three instruments made but one agreement. Your answer really amounts to this, — that Mangles and Co. are bound, on the ship's arrival, to give an acceptance for the whole freight remaining due.]

They are so. If the equities of this bill are founded on \* the true effect of the transaction as between Mangles and \* 717 Boyd, then, as this is a secret agreement affecting a contract by which legal rights were created, Dixons cannot be affected without notice, and there has not been any notice here. On the contrary, Mangles and Co., by paying all the monthly instalments of freight, acted towards Dixon and Co., until after the loss was ascertained, on the footing of their rights being perfect under the charter party. There was nothing on the face of the instrument itself to induce Dixon and Co. to ask Mangles and Co. whether they had any claims inconsistent with the charter party. The conduct of Mangles and Co. did not give rise to any question on that point.

[THE LORD CHANCELLOR. — Mangles and Co. are to pay 8s. a ton ; the owners are to pay 8s. a ton : they did not pay, they had

<sup>1</sup> 10 Barnewall & Cresswell, 558.

<sup>2</sup> See as to collateral agreements affecting bills of exchange, *Salmon v. Webb*, ante, p. 510.



to receive ; but their nonpayment was equal to payment. At the end of the voyage, and after the delivery of the cargo, the differences would be calculated. It was reasonable enough that Mangles and Co. should go on paying the monthly instalment of 150*l.*, and yet not be liable at the end of the time to the whole 16*s.* a ton. Nothing can be more plain than the legal operation of the charter party ; but then the question is, what is its equitable construction ? Is there or not, on the part of Mangles and Co., a right to prevent Dixon and Co., who stand in the place of Boyd and Co., from recovering, at the close of the transaction, what Boyd and Co. could not have recovered ?]

Whatever might be the equity in this respect between Mangles and Boyds, no notice of this secret partnership having been given to Dixons, it cannot be insisted on as against them. Under such circumstances, the general rule as to the equities arising on the transfer of a chose in action do not apply. This case was \*718 properly decided on the \* principle laid down by this House in *The Duke of Beaufort v. Neeld*,<sup>1</sup> to which Lord Cottenham referred.<sup>2</sup> There was here, as there, a representation on which third parties were induced to act, and which, therefore, gave them rights that could not afterwards be contested by those who made the representation. In that case, Lord Cottenham would not admit a party to say that his undisclosed authority had been exceeded ; nor ought the party here to be allowed to set up an undisclosed agreement in order to affect a valid instrument disclosed to third parties, and acted on by them.

In *Hill v. Caillouel*,<sup>3</sup> which was a strong case, for it was one of a *post obit* given by a young heir, Lord Hardwicke said :<sup>4</sup> “ The rule is right, that whoever takes the assignment of a bond being a chose in action, takes it subject to all the equity in the hands of the original obligee ; but length of time and circumstances may vary that, and make the case of the assignee stronger.” Undisclosed agreements, such as existed in this case, would certainly not weaken, but strengthen, the title of the assignee. The authority of any case may therefore be admitted which merely states the general and well-known rule, that an assignee takes subject to the equities which affect the assignor ; but where special circumstances exist, as they do in this case, that general rule, though

<sup>1</sup> 12 Clark & Finnelly, 248.

<sup>2</sup> 1 Ves. Sen. 122.

<sup>3</sup> 1 Macnaghten & Gordon, 447.

<sup>4</sup> 1 Ves. Sen. 123.

of unquestionable authority in itself, receives a modified application.

*Mr. Rolt*, in reply. — The case in the Exchequer does not affect the present. Admitting the judgment there, as a judgment at law, to be right, the appellants now claim to be relieved against the \* effect of it by the rules of equity. *Rawson v. Samuel* is not in point, for in that case there had been a distinct breach of agreement. There was none here. All the three papers constituted but one agreement. There was no concealment intended. It was necessary that the three distinct papers should be drawn up, because, except by that mode of proceeding, the real intention of the parties could not be carried into effect. It is because a chose in action does not, upon its bare assignment, disclose all the equities which exist in relation to it, that the assignee is bound to inquire what are those equities; and if he takes the instrument without inquiring, he must be bound by them.

THE LORD CHANCELLOR. — My Lords, — This case is not so important with respect to the amount of property involved in it, as it is with regard to the principle of equity which your Lordships are called upon to decide. There have been divided opinions in the Court below, and your Lordships are now called upon finally to determine what is the true construction of the different instruments which have been executed, and what is the rule of equity properly applicable to the case.

There are two important subjects to be considered. First, what is the real construction of the different instruments as between the parties to those instruments? And, secondly, what is the construction and operation of those instruments as between the charterers and the bankers, to whom the owners had mortgaged, or rather made, an equitable assignment of the charter party? I propose to consider, first, the operation of the instruments as between the parties to them, without any reference to the difficulties which have been introduced by the assignment of the charter party to the bankers.

The agreement is clearly proved; but I shall feel it my \* duty, under the peculiar circumstances of this case, and \* 720 as the facts do not seem to have been properly apprehended

in the Court below, to refer your Lordships, more than I am in the habit of doing, to documents to prove what really was the agreement. The transaction was of this nature. Messrs. Mangles were desirous of chartering a vessel in search of guano. Messrs. Boyd were shipowners and importers of guano upon a large scale, and they had a vessel, called the Fifeshire, which they were ready to let upon freight, to search for and bring back guano. That vessel happened to be of too great a tonnage for the proposed charterers, Messrs. Mangles, and therefore it was suggested, on the part of Messrs. Boyd, that they might take half and risk half of the venture; and in that way Messrs. Mangles would have, indirectly, the precise quantity of tonnage which they required. The agreement which was entered into upon that basis was carried into effect through the instrumentality of the brokers on each side.

It naturally occurred to the brokers, and had, indeed, been suggested by the solicitor to one of them, that, as the owners of the vessel, Messrs. Boyd, were themselves to be co-charterers, a difficulty would arise unless the documents assumed a particular shape; that is, it would be difficult to draw a contract which should give a right to Messrs. Boyd to recover only the portion of the freight which was to be paid by Messrs. Mangles, whilst Messrs. Boyd appeared upon the face of the charter party itself as the owners of the very vessel which was to earn the whole freight. Before stating how that difficulty was got over, I must say that the witnesses clearly proved that the precise agreement between the parties was this, that each party should bear half the expense.

The sum of 16*s.* a ton was the price fixed for the freight, \*721 and, accordingly, \*the clear agreement, without the slightest doubt, was, that each party, the owners, and the charterers properly so called, should bear 8*s.* of that freight (and in that way 16*s.* were to be paid), and the risk of the venture, whether it turned out profitably or the contrary, was to be borne equally between them. I find no fault with the way in which that object was carried into execution. They adopted this plan. There was a pure, simple charter party between Boyds on the one hand, and Mangles on the other, by which Boyds lent their vessel on freight to Mangles to go in search of guano; and the freight to be paid was at the rate of 16*s.* a ton. Bills were to be given, at different dates, one upon the sailing of the ship, another at another

time, and so on till a certain number of months had elapsed, and then a payment of 150*l.* in cash was to be made every month, for the freight, by Messrs. Mangles, the freighters upon the face of this instrument; and when the ship came home, a bill at ninety days' date, which is a very material circumstance, was to be given by Mangles to Boyd for whatever might be the balance due for freight upon the adventure, or it was to be paid in cash equal to a bill; that is to say, there was to be a discount equal to the term of ninety days, which was the period the bill would have had to run.

The first circumstance which would strike any one conversant with matters of business on reading this charter party is, that the sums which were to be paid monthly for freight were, as nearly in round numbers as could be, just one half of the 16*s.* a ton; showing, therefore, upon the face of the charter party itself, the intention of the parties to carry into effect the real agreement that, during the voyage at all events, Messrs. Mangles were not to pay more than their half of the freight, which was stated on the face of the charter-party to be payable.

\* One important thing to ascertain is this, was there any \*722 fraud intended or carried into execution? was there any secrecy in the transaction? Clearly and indisputably there was not. It was a simple mode of carrying into effect the real object of the parties; and, conversant as I am with the forms of conveyancing, I do not myself know how it would have been easy to carry their real intention into effect in a better way.

The plan was this. After that charter party had been executed, by which no doubt, upon the face of it, Messrs. Mangles were the sole charterers, and Messrs. Boyd were the owners letting their ship at freight, a clerk of Messrs. Boyd, of the name of Ashton, was put forward as if he was a person who was to undertake the half of the risk, and one half of the venture; he accordingly executed an agreement, which I will call number two, and by which he formally assumed a share in the adventure. All the agreements, I must observe, were executed on the same day, — the 24th. The charter party was dated the 23d, and the two other documents were dated the 24th; but they were all executed on the same day and at the same time. There is no doubt that that stipulation of Ashton's included tonnage, because the tonnage was to be paid, at all events in account, to Messrs. Boyd (we shall

presently see how it was to be paid) ; and then by another document, which I will call number three, Messrs. Boyd entered into a guarantie with Messrs. Mangles, that Ashton should perform his part of the engagement. All this was a mere contrivance, a piece of machinery to carry into effect that which the parties would have done directly, but for the difficulty which had been interposed by the fact that Messrs. Boyd were both owners of the vessel and adventurers on this voyage of speculation. It is admitted that

Ashton was merely a nominee. In this case your Lord-  
\*723 ships are sitting \* as a Court of Equity, and therefore, as a

Court of Equity, you can entertain no doubt that Ashton represented, and in point of fact was, for all the purposes of this cause, the firm of Messrs. Boyd. Then was there any thing secret in this transaction? Decidedly not. In the first place, it was known openly to the brokers of both parties, and carried into execution by them just in the way they thought proper, and was manifestly communicated to their clerks. And we have these two remarkable circumstances, that Messrs. Boyd having, before the ship sailed, furnished certain materials and implements, which cost more than 100*l.*, for the purpose of loading the vessel with guano, they, in consequence of the agreement that the expenses should be borne equally, made out an account by which one moiety of the aggregate of those charges was debited to Mangles and Co., and paid by them. Now that was necessarily seen at once by the clerks in Boyds' house, and they and Ashton, who was one of their clerks, and their brokers, and everybody in point of fact that had any thing to do with it, must have perfectly known the real nature of the transaction. There is a still more remarkable circumstance. Ashton had a brother who was resident at the Cape, and who was there the agent of Messrs. Boyd. In August of the same year, when nobody knew where the vessel was or whether the adventure was successful or otherwise, Messrs. Boyd wrote to Ashton, at the Cape, their own agent, and stated to him that they had got the *Fifeshire* and another vessel, the *Jane*, on a voyage for guano, and that they had taken half the risk in both these vessels. So that this was not a solitary transaction ; and so far from desiring to make it a secret transaction, they communicated it to their agent at the Cape, amongst other matters of business, without the slightest intimation that it was to be a secret matter. In short, they were very great importers, as appears from

\* that letter, of guano, and it was in the natural course of \* 724 their business, if circumstances called for it, that they should, if they could, let a vessel and join in the adventure.

My Lords, Ashton, their clerk, has proved this. He had a conversation with Messrs. Boyd after they had agreed to take a half of this venture, and he asked them what had induced them to do so. Upon that Messrs. Boyd said: "Our inducement is this: we shall get 8s. a ton from the charterers, Messrs. Mangles, and that will pay the ship's expenses; so that we cannot do any great harm; and if the adventure turns out fortunately, we shall have a large sum of money, probably, as the return of the voyage; but, at all events, the ship's expenses are covered by the 8s. a ton." This is proved very clearly by the evidence of Ashton, who enters fully, in his evidence, into the details of the matter; and the agreements show, beyond all doubt, that which is admitted by Messrs. Boyd themselves, in their answer, in most distinct terms, and has, indeed, never been disputed, that all three agreements made but one transaction. This is very important with respect to the view in which I am now considering the effect of these instruments, namely, as against themselves; and the fact is proved, not only by the evidence of Ashton, but also by that of the brokers. [His Lordship here referred to and read several passages from the evidence of these witnesses.] What the real agreement was, therefore, admits of no doubt, and I have now explained the grounds upon which the particular machinery, thus employed, was adopted. I state to your Lordships, without hesitation, that there is no trace, in any part of these voluminous proceedings, of any intention to make a secret arrangement, or of the slightest desire to keep it secret.

The ship sailed on the 1st of August, 1845; — but we will \* stop a moment to consider how this was to operate; \* 725 and I think nothing can be more clear and plain. Messrs. Boyd were the owners, and they were the half-charterers, they filled both characters; and Messrs. Mangles also were half-charterers, and filled only that character. They were to pay by express stipulation, and they were liable to be sued at law for the recovery of their moiety of the freight. What was that? Eight shillings a ton a month. The sums stipulated to be paid by them during the voyage and by instalments were all, as I have shown, measured by that amount, being, as nearly as possible one half of

the whole. How was the other half to be borne? By the other co-charterers. Who were they? The owners. What was the consequence? That they received the money every month; they had it in hand; but if they had to receive, they had also to pay, though the payment was to be made to themselves. They had to pay as charterers, and to receive as owners; and in that way, therefore, the whole 16*s.* a ton were actually paid to the owners during the whole of the voyage, and up to the moment the ship arrived at its destination in London. I deny, my Lords, that there was a single shilling unpaid so far as those two sums represented the whole amount of the two halves. The whole freight was regularly paid, either by monies down or by retaining them, which was equal to monies down, so as to satisfy the whole 16*s.* a ton during the voyage.

This case has been tried at law. It was tried in the Court of Exchequer, and there<sup>1</sup> the Lord Chief Baron and Baron Parke, having the documents before them, gave an opinion that the true construction of the agreement was, that the freight was to be paid

for the whole, whatever might be the balance of account;

\* 726 so that, at the conclusion \* of the voyage, Messrs. Mangles were bound to give a bill for the remaining half of that freight, and that they could not treat No. 2 and No. 3 as part of the original agreement.

The case at law assumes a very singular aspect; and I must say, shows the danger of mixing law and equity together; this being an assignment of a chose in action, as it is called; that is, of a charter party which is not assignable at law, but may be assigned in equity; I will assume, for a moment, the equitable assignment to Messrs. Dixon. The action was brought, in truth, by Dixon; but necessarily in the name of Messrs. Boyd, because the charter party was not assignable at law; but as they had an assignment in equity, they were authorised to use the names of the parties legally entitled. In the Exchequer, the learned Judges admit the action, not simply as the action of the owners of the vessel for the freight, but they admit it as the action of the owners in the character of trustees for the bankers, and they advert to the equitable title of the bankers in regard to their decision. In that way, my Lords, they in point of fact administer, as it were, equity, for they advert to the equity, and yet they do not carry out the equity. Both the

<sup>1</sup> 3 Exch. 387.

learned Judges say, that the very construction that they put upon the instrument was put upon the instrument by Messrs. Mangles themselves; for that, after the equitable assignment to Messrs. Dixon, the bankers, they, the Messrs. Mangles, made the monthly payments to the bankers. But how could they refrain from doing so? That was part of the contract; it was intended that Messrs. Mangles should pay the tonnage regularly, by monthly instalments. After the first payment during the voyage, they could not relieve themselves from that liability, whatever might be the result of the accounts. It was intended that the freight should be paid pending the voyage, and up to the close of it, in the way I \* have stated. Then what construction was there to be put \* 727 upon those payments? None other than that they were made in obedience to the actual terms of the contract and the real intention of the agreement. I cannot, therefore, draw that inference which the learned Judges have drawn. I think it was in perfect obedience to the contract, and according to the terms of the contract, that the monthly payments were made.

Let us see, for a moment, what the rights of the parties were, upon the real merits of the case, and according to truth and good conscience. What is the nature of the real transaction? You shall pay 8*s.*, or rather, we will pay between us 16*s.* a ton during the voyage; that will cover the ship expenses; you shall pay one part, we will bear the other part ourselves. There is to be a joint account made out when the voyage is ended, and then there is to be a bill at ninety days. Now it would not require ninety days — we shall see it could not — to sell the cargo; and therefore, that distant day was, in point of fact, named to enable the parties to wind up their accounts; and the reason why, upon the face of the charter party, the charterers were made liable to give a bill at the end of the voyage, was manifestly and simply this, because it otherwise would have been inconsistent with the principle of the charter party. You could not carry it out as a legal instrument, unless you carried it out wholly. If they had not made the instrument in this form, — and it was but form according to my view of the matter, — if they had not carried it out to the whole extent, they would have disclosed the very thing which they did not want to show on the face of the instrument, namely, that there was no legal right in Messrs. Boyd to bring an action for the 8*s.* a ton pending the voyage.



This, then, was the transaction between these parties: Each is to pay (and in this respect I look upon Messrs. Boyd as  
 \*728 having two perfectly distinct characters); Messrs. \* Boyd, as co-charterers, were to pay 8*s.*, and Messrs. Mangles, as co-charterers, were to pay the other 8*s.*; and that was all to be paid regularly up to the time the voyage ended. Messrs. Mangles were then to give a bill, at a distant date, for the sake of this form. But what is the substance? Why, that the Boyds, at the end of the voyage, shall partake of the profit, if there be any, and shall bear also the loss, if there be a loss. What is first to be deducted? The words are singular, — “payment or deduction.” What is to be deducted? The freight. It was intended in the account, undoubtedly, that Messrs. Boyd should have 16*s.* a ton a month for freight. Let us see what actually did take place, and then see what the supposed equity is; for I am still speaking as between Messrs. Boyd and Messrs. Mangles. On the 17th or 18th of August, 1846, the ship arrived; on the 5th of September, 1846, the final freight became payable, and at that time a bill at ninety days ought to have been given, or cash; and it is singular that the Messrs. Dixon demanded cash, to which they had no right; and they do not allow the other party, Messrs. Mangles, the right, which the latter clearly had, to give either a ninety days’ bill, or to pay in cash with a discount, according to the charter party. On the 21st of September, in the same year, the cargo was sold, and on the 10th of November, then next, the accounts were made out by Messrs. Mangles, and the balance, after allowing for the freight properly, was tendered to the persons who then represented Messrs. Boyd. Now suppose it had been tendered before the bill became due, how can it be contended, upon the result of these accounts, that Messrs. Boyd could have recovered a single shilling of the extra 8*s.* a ton during the voyage from Messrs. Mangles, the agreement being that they should bear the charge equally, and during  
 the voyage pay equally the freight, and that the freight  
 \*729 should be \*brought into the account at the end of the voyage, and that they should then bear the profit or loss? The bill for ninety days would not have become due till the 7th of December. On the 10th of November every account is made out, the transaction is closed, and the balance of the money is ready to be paid to the party entitled to it. What would be said of equity in this country, if a man having the result of an account

in his hand, ready to pay over, is to be told, in point of form he is first of all to pay that which he never contracted to pay, against which the parties agreed to indemnify him, which they themselves were liable to pay, and which, though they were entitled to receive, they in point of fact had received by retainer during the voyage, and up to the moment when the voyage closed? Can we be told that it is equitable that the supposed charterers should pay the whole, in order afterwards to have the right to demand a part back again?

Some cases were cited of cross demands. This is not a case, in my apprehension, either of a cross demand, or of a set off: strictly, it is neither one nor the other; but it depends upon the true meaning of the agreement. The freight never became due in equity from the Messrs. Mangles, because the agreement was, that they never were really to pay it. The consequence of which is, that it is not a proper subject to be charged in this account against Mangles, but relief to the extent of half the amount of the stipulated freight is to be given to them. I think I never saw any thing much clearer than that, as between Messrs. Mangles and Co. and Messrs. Boyd and Co., the former were not liable to pay the extra freight. It had by the force of the agreement been already received during the voyage, and therefore there was a clear equity as between those parties.

That closes the transaction as regards these parties, and \* then the case assumes a very different shape, and a very \* 730 important one, which involves certainly the consideration of one of the most important points of equity law that I am aware of; and it is singular that it should be reserved for decision at this time. The case in that respect is this. Messrs. Dixon, who were the bankers of Boyds, had, at an early period, namely, the 29th of May, 1845, advanced 12,000*l.* to Messrs. Boyd, upon their promissory note. That was entirely independent of any transaction of the charter party; it had nothing whatever to do with it; it was not advanced, as it seems to have been understood by the Lord Chancellor in the Court below, on the joint account of these charterers. I have read every word of these proceedings, and sought in vain for any trace of justification for such a notion. The bankers admit that the advance was not made on the security of the charter party, that they did not originally look to it as their security, and they also admit what, by and by, will be important,

that they advanced no further sum after they got the assignment of the charter party. They remain for some time upon the security of the promissory note; but they become a little alarmed, apparently; for there were 11,000*l.* still due to them upon that account, and I suppose they called for a security. The result was, that Messrs. Boyd gave them the charter party, and we must take it, gave to them the charter party alone; and in the margin of that instrument this was written: "Messrs. Mangles, Price, and Co., please to pay the amount of what is due from this date to Messrs. Dixon and Co., or their order. Boyd and Co., 1st December, 1845." It will not be disputed that that is a mere direction to pay the amount of what was due, without stating any particulars; it does not state 16*s.* a ton to be due as stipulated by the charter party; it only says, "Please pay what is due," and that will not be disputed \* 731 put \* to be a good equitable assignment of what was due.

They remained upwards of three months upon that security, without giving notice to Messrs. Mangles that they had taken that assignment, and yet we all know that that notice was exceedingly essential to their own safety in many respects; but being satisfied with the dealings between themselves and the Boyds, they did not give any notice until the 14th of March, 1846, when they gave notice, but not quite in the terms of the indorsement which I have read, for they introduce words rather more copious than the words used in the assignment to them. So that they first of all remain five months without any security whatever, and then they take a security for the balance; they then remain above three months without giving any notice of this security they have taken; they make no communication to the Messrs. Mangles, and they ask no question of Messrs. Mangles. Very shortly after that, namely, about two months afterwards, the Messrs. Boyd became insolvent. The question now is, what are the rights of Messrs. Dixon under these circumstances? Just stop at this moment and see what were the rights of these parties when the actual notice was given. If there is one rule more perfectly established in a Court of Equity than another, it is, that whoever takes an assignment of a chose in action, which this charter party was, for it is not assignable in law, although it is in equity, takes it subject to all the equities of the person who made the assignment. No barrister would presume to deny in any Court of Equity, that at the time that assignment was taken, and down to the time when the notice was given, during all these months, the

bankers took precisely the same interest, and were subject to the same liabilities, namely, to No. 2 and No. 3, as were the Messrs. Boyd themselves. If they had notice, it only introduced a new head of equity against Messrs. Dixon, \* which is, that \* 782 they are bound by the notice which they have, for equity will not permit a man to shut his eyes to a fact of which he has been informed; and therefore, if he has notice, he is bound by the knowledge he has thus acquired. But the rule to which I have referred applies where there is no notice. And although one may suppose Messrs. Dixon to be utterly unacquainted and uninformed of either No. 2 or No. 3, they were bound by Nos. 1, 2, 3, as forming one agreement, precisely to the same extent as Messrs. Boyd themselves were bound at the time of the execution of the agreement. They do not ask any question of Messrs. Mangles when they do give the notice, as they had asked none when they took the security. It was not a security given for money then advanced, it was for money which had already been advanced; and in their notice they intimate that fact, for they say "for valuable consideration." It was, therefore, as they state it truly, for a past consideration; and this security was taken, as many such securities are daily taken in the city of London. No doubt, at the time, they thought it prudent to make themselves as secure as they could, and they took the best security which their debtor had to offer; but they took it with all the liabilities to which he was subject upon it, and your Lordships must fix them, in point of law, as being cognizant of those liabilities under the rule to which I have drawn your attention. The important question then is this. When the notice was given, was it incumbent upon Messrs. Mangles to write back to Messrs. Dixon and to tell them that there were, besides the charter party, documents Nos. 2 and 3? In the first place, who is to inquire and to take the trouble in these cases,—who ought to do that? Why, the person who ought to do it is undoubtedly he who is fixed with the liability. Messrs. Dixon were fixed with the liability. If they \* desired to \* 783 remove that liability, they ought to have made due inquiry, and therefore, *prima facie* at least, the loss ought to fall upon him who, having the duty to inquire, has not thought proper to inquire. He has no right to speculate whether he shall obtain an answer which may disclose circumstances that he is not desirous to know; and if there is to be a loss, the loss ought to fall upon

him who, being subject to the liability, and having to remove that liability if he can remove it, ought to inquire and does not inquire. I must take care and guard myself upon this important point, as not for a moment meaning to say that if that notice of the bankers had shown that they had been deceived, that they were advancing money upon a ground which they misunderstood, and if the charterers, Messrs. Mangles and Co., had stood by, well knowing that circumstance, and had been silent, the result would have been the same: I agree that the case would be altogether different. It would then have been incumbent upon the Messrs. Mangles to disclose the real circumstances of the case to Messrs. Dixon; and if they did not do so, they would be just as much bound as it is now contended they ought to be bound. Let us see how the case stands in that respect. The dealing, remember, was between Messrs. Boyd and Messrs. Dixon, without any intervention in any manner, directly or indirectly, or any inquiry of Messrs. Mangles. What was there to induce Messrs. Mangles when they received that notice to suppose that Messrs. Boyd had been committing a fraud upon Messrs. Dixon, their own bankers? "Pay what is due," they say. Messrs. Mangles of course intended to pay what was due. Why were they to suppose that No. 2 and No. 3 had not been communicated to Messrs. Dixon, who put trust and credit in the statement of Messrs. Boyd, and who advanced this sum of 12,000*l.*

upon their mere promissory note, and remained content \* 734 \* with it for months. They subsequently take an assignment; but they do not communicate that assignment even to Messrs. Mangles for two or three months afterwards; then they give the notice, and then they say, "We have told you of this transaction now, and you shall be liable to every thing which we have neglected for our own security. We have neglected to inquire, we have dealt behind your back with Messrs. Boyd. We, the bankers, have dealt with our own customers without your intervention; they have incurred a great debt with us, and we have taken an assignment of this, which is not an instrument assignable, except in equity, and which imposes all the liability upon us. We did not for a long time communicate that fact to you; we have never made any inquiry whether you have had any dealings with them; but now that we give you notice of the assignment, we throw upon you at once the whole liability, and desire you to indemnify us for our own negligence, our own want of

care and caution, which, duly exercised, would have prevented this."

Now certainly that is a new point. I admit the books do not establish the rule; but I think the principle is perfectly clear, that where there is no fraud, nothing to lead to the conclusion in the mind of the party who receives the notice, that the party who gives it has been deceived and is likely to sustain a loss; I say it is clear that the former is not bound to volunteer information. I conceive that equity will not require the party who receives the notice, impertinently almost, to interfere between two parties who have dealt behind his back, and who have never made any communication to him, or even seen him, on that subject. Had Messrs. Mangles done so, they must have begun by supposing that Messrs. Boyd had cheated Messrs. Dixon, and they must have had the hardihood to say, "We are afraid that Messrs. Boyd have been committing a fraud upon \* you, for we do not see that you \* 785 mention No. 2 and No. 3; therefore we are forced to tell you of them." Suppose that Messrs. Boyd had, as the probability was, really stated the facts, it would have been a very disagreeable answer, I imagine, that would have been received by Messrs. Mangles to that communication. Your Lordships were asked by the learned counsel at the bar who appeared for Messrs. Mangles, — and upon the subject of character it was put as a very fair question, — whether, after the turn this case has taken, the House would say that there was any thing fraudulent in the transaction as between Messrs. Mangles and Messrs. Dixon; and I cannot help stating to your Lordships, that my clear impression is, that there is no trace of any such fraud, or any fraudulent intention, on the part of the Messrs. Mangles.

Another view of it is this; it did not at all follow that upon the result of the transaction there would not be enough to pay Messrs. Dixon. That depended upon the success or failure of the adventure, as to which nobody knew what would take place. The adventure did not turn out successful; but nobody could anticipate that, and there is no doubt, as between Messrs. Boyd on the one hand, and their own bankers, Messrs. Dixon, on the other, that Messrs. Dixon would have been entitled to the whole extent of the freight earned, to the whole 16*s.* a ton, during the whole voyage.

The authorities upon this subject, as to liabilities, show that if a man does take an assignment of a chose in action he must take his

chance as to the exact position in which the party giving it stands. The case of *Cator v. Burke*<sup>1</sup> very strongly illustrates that. There the defendants, the Burkes, had entered into a bond of 500*l.* to

the other defendant, Hargrave, for securing 250*l.*, and Har-

\* 736 grave \* had given to them a counter bond. Hargrave then deposited the first bond with a man of the name of Cator, and Cator filed his bill, in order to prevent the parties at law from setting up their counter bond. Nothing could appear more fraudulent upon the face of it than a bond and a counter bond; because there you do enable the party to deal with the bond you give him, when you know that you have a defence in your hand, namely, a counter bond, to set up as a defence to the legal obligation. Cator does not appear to have had notice. The Lords Commissioners held that there was no equity, and Lord Thurlow, on the rehearing of the case, seemed to think that it was not satisfactory; but he decided it upon this ground, — that a special purpose appearing for the bond to Hargrave, and that it was not to give a general credit, the plaintiff was not entitled to the remedy prayed, and therefore affirmed the Lords Commissioners' order of dismissal. I understand that decision to amount to this, — that, there being no general claim, but there being a special purpose, which was properly provided for by the counter bond, the man who took an assignment of the original bond was not entitled to have any remedy against the counter bond, though he knew nothing at all of it. That is certainly the strongest case that can be upon the subject.

In *Turton v. Benson*,<sup>2</sup> the case was one where Benson, upon the marriage of his daughter, had advanced a sum of money, and took a bond, which equity always holds as void, from the son-in-law to return part of the marriage portion. The bond was deposited with one Sir Theodore Janssen, as an additional security for money due. Mr. Benson died. Sir Theodore's demands were afterwards paid,

and then the administrator assigned the bond for the benefit

\* 737 of the general creditors of the deceased. The Master\* of the Rolls declared "that the creditors of Benson could not be in a better condition than Benson himself, and as to Sir Theodore Janssen, it was to be considered that he had no legal title to this bond, but only an equitable assignment; and, therefore, having a security which was not good in equity, he could not be in a better condition than Benson himself was; that supposing a man

<sup>1</sup> 1 Brown, C. C. 434.

<sup>2</sup> 1 P. Wms. 496, 2 Vernon, 764.

should assign over a satisfied bond as a security for a just debt, the assignee could not set up this bond in equity, which, being satisfied before, could receive no new force from the assignment. That it was incumbent on any one who took an assignment of a bond to be informed by the obligor concerning the *quantum* due upon such bond, which if he neglected to do it was his own fault, and he should not take advantage of his own laches." There are other passages to the same effect when it afterwards came on before the Lord Chancellor. That shows clearly, what has never been disputed, that whatever may be the state of the account, although not even one single shilling is due, the man who takes an assignment of the bond must take it just as he finds it, and he cannot insist on the legal obligation that remains; the liability at law remains just as good as ever, but there is no obligation in equity. The man who took the assignment ought to have inquired. This is the doctrine laid down in *Matthews v. Wallwyn*<sup>1</sup> and in *Chambers v. Goldwin*,<sup>2</sup> which is still stronger. Where a man takes an assignment of a mortgage and gets the legal estate; even in that case he has not done sufficient for his perfect security to take it without having communication with, and obtaining the concurrence of, the mortgagor; for, whatever be the state of the account, although he gets a transfer of the legal estate, he is bound by the state of the account; and he cannot recover a shilling beyond what is actually due, \* although there is no indorse- \* 788 ment of payments upon the mortgage deed, and although he has no notice of a single shilling of the money having been paid off. The rule, therefore, is perfectly clear.

Now, my Lords, the only question that remains to be considered is the conduct of the parties in this case after the notice. The notice spoke, as I told your Lordships, of past consideration. It is admitted, as I have stated, by the Messrs. Boyd and by the bankers, that no advance was made upon the charter party, nor after its assignment; that they made no inquiry; and the question is, whether the mere payment of the monthly instalments of freight by Messrs. Mangles can or cannot affect their right to have an account taken.

It appears to me, my Lords, for the grounds and reasons I have already stated, that no question could arise from that circumstance, because they were under an absolute legal liability to pay,

<sup>1</sup> 4 Ves. 118.<sup>2</sup> 9 Ves. 264.



and not simply a legal liability between the original parties, but an equitable liability between themselves and the assignees of the charter party. It was not merely a charter party by which they were bound by law, but it was a true and real agreement in equity that they should pay, pending the voyage, that monthly sum of 150*l*. And as in equity the charter party was assignable, the assignee became in equity entitled to that 150*l*. Therefore it was an act done in obedience to the charter party, and in consequence of the liability to pay what sum was due from "this date,"—for those are the words used in the assignment; and therefore they were merely performing properly, legally, and equitably their part of the agreement. The due performance of an agreement never can be considered as the ground for fixing parties with a liability to something beyond that by which they are equitably bound.

\*739     \*It was stated, that in the Court below the judgment was postponed for, I think, a year; and it may have been by accident that the facts in some degree escaped the recollection of the noble and learned Lord, of whom, as a Judge, it is impossible for any one to speak here or elsewhere without great admiration, for the pains which he took, the ability which he displayed, and the knowledge that he possessed. No successor of his can differ from that noble and learned Lord without feeling very great doubt whether he himself has arrived at a just conclusion; but that learned Judge certainly had an impression against Messrs. Mangles which does not appear to me to have been warranted by the facts of the case. He supposed the transaction to have been secret. I have shown to your Lordships that the very contrary was the case. He seemed to find fault with the decree of the Court below, because there had not been an inquiry as to whether the 12,000*l*. had been advanced for the joint adventure. There was no pretence for such an inquiry; because the bankers themselves say they neither advanced it in regard to that adventure, nor did they advance any thing after the assignment. His Lordship seems also to have supposed that Messrs. Mangles might have received notice of the assignment before the actual notice was served. There is no trace of any such thing in these pleadings, and the impression on his mind at the time, that there had been something irregular on their part, was certainly erroneous.

I have paid very great attention to this case, which I am

especially bound to do, differing as I do from the decision of the Lord Chancellor, believing the true rule in equity to be that which I have stated. The only ground on which I understand the decision was rested was this, that where a man having an interest in property stands by and sees another man dealing with that property as owner, with another person who is ignorant of the want of title in the \*person with whom he is dealing, \*740 equity will bind the man who stands by. Now nobody denies that proposition; nothing can be more perfectly settled. The Lord Chancellor referred to the case of the *Duke of Beaufort v. Neeld*.<sup>1</sup> There the Duke's agent, with a power to act, had instructions not to act, except under certain circumstances, but he exercised the authority without disclosing those instructions; and it was held that the principal was bound. But how does that apply to this case? The agent was there in the place of the principal, the instructions given to him were not disclosed; he was, therefore, an agent with full authority, and nothing could be more dangerous to the dealings of mankind than to hold that a man was not bound by the act of his agent to whom he had given full authority, because the agent had secret and private instructions not to exercise his power, except in a particular case. I cannot see, my Lords, how that bears upon this case, for the facts are not identical, nor even similar. I cannot find any facts here to bring this case within that rule. There was no standing by on the part of Messrs. Mangles when they saw Messrs. Boyd dealing with Messrs. Dixon, the bankers; the dealing was behind their backs five or six months before; they did not even know that the transaction had taken place. What fraud was there? What standing by was there? They were wholly unaware that there had been an assignment of the charter party as a security, until some two or three months afterwards; when there being the danger, no doubt, of the insolvency of the Messrs. Boyd, the Messrs. Dixon gave notice; but what standing by was there? Let any man point out what damage accrued to the Messrs. Dixon in consequence of the acts of Messrs. Mangles. The Messrs. Dixon may have been very much damaged by the \*acts of Messrs. \*741 Boyd, but Messrs. Boyd were the persons with whom they were dealing, and behind the backs and without the knowledge in any manner of the Messrs. Mangles. The result, therefore, is,

<sup>1</sup> 12 Clark & Finnelly, 248.

that there was no standing by on their part; they simply did not do what I think they were not called upon to do, namely, make a communication of circumstances which they had no reason to suppose had not been honestly disclosed by Messrs. Boyd to their own bankers, the bankers being perfectly content with the dealing between themselves and the Messrs. Boyd. There cannot be a doubt that, under such circumstances, in a Court of Equity, Messrs. Dixon cannot, at the last moment, turn round upon Messrs. Mangles and say, "When you received notice of this, you did not tell us that there were No. 2. and No. 3 which we did not know." They could have no reason to suppose that those papers had not been communicated.

My Lords, as the result of the case, after the most anxious consideration of it, I have come to a very clear opinion, that there is no equity on the part of Messrs. Dixon as against Messrs. Mangles. The appeal must, therefore, be allowed; and the case will stand upon the decree of the Vice-Chancellor. If there is any thing in that decree which requires modification, I shall be quite ready to hear any thing which may be suggested in regard to it. This seems to me to meet the justice of the case, and therefore I propose to your Lordships that the decree of the Lord Chancellor be reversed, and that the decree of the Vice-Chancellor be upheld.

. Decree complained of reversed.<sup>1</sup>

1852. June 16, 18.

ANDREW CURSON (Pauper), *Appellant*.  
THOMAS BELWORTHY, *Respondent*.

*Sale of Estate. Fraud. Haste and Improvidence. Equity.*  
*Pleading.* •

A., who was a labouring man, receiving about 9s. a week, and totally uneducated, believing himself to have a contingent interest in an estate in fee simple, offered, in February, 1838, to sell his interest to B. B. applied to his attorneys, who

<sup>1</sup> Lords' Journals, 22d June, 1852.

advised, that as A.'s father might cut off the entail, A. had no saleable interest. B. declined the purchase; but shortly afterwards consented to lend money to A., and lent different sums, amounting in the whole to 20*l*. A., on the 5th of May, 1838, executed a money bond, conditioned in the penalty of 40*l*., to secure the payment of 20*l*., with 5 per cent. interest, on the 5th of November then next. A. was not called on for interest, nor did he hear of the matter again till the 22d of September, 1840, the day of his father's funeral. His father had not interfered with the descent of the property, and A. had at that time become possessed of the estate. On the 24th of September, A. entered into an agreement to sell the estate to B., and that agreement was carried into execution by a conveyance on the following 10th of October. The bond, agreement, and conveyance were prepared by B.'s attorney, and executed at his office. A. had no attorney. The estate was sold considerably under its value. A. afterwards filed a bill alleging these facts, and praying that the deed of conveyance might be set aside as fraudulent and void:—

*Held*, that the bill, as a bill charging fraud, was properly dismissed.<sup>1</sup>

*Quære*, whether A. might not have maintained a bill to set aside the conveyance as improvidently made and hastily executed.

THIS was an appeal against an order of Lord Chancellor Cottenham, which affirmed a decree of the Vice-Chancellor of England.

Curson, by his bill filed in April, 1841, and amended in the following year, stated that his paternal grandfather \* was entitled, in his lifetime, to an estate in fee simple, \* 743 called Ham, at South Tawton, in the county of Devon, consisting of a farm-house and eight acres of land, with an unlimited right of common over Itton Moor, subject to a mortgage in fee to George Pike Sanders for 120*l*., with interest at five per cent., and had devised the same to John Curson (the plaintiff's father), and the heirs male of his body, and died in 1817: the plaintiff's father entered into possession, and died on the 19th of September, 1840, leaving the plaintiff his eldest son and heir male: the plaintiff could neither read nor write, and depended for the subsistence of himself and his family on his wages of 1*s*. 4*d*. a day; the defendant occupied a farm adjoining Ham, which, by reason of its locality, was of considerable value to him; the plaintiff, during the lifetime of his father, in February, 1838, believing that he had a contingent interest in Ham, entered into a negotiation with the defendant to dispose of the same to him for the sum of 40*l*.,—the defendant, after consulting with Messrs. Medland and Francis, his solicitors, declined to purchase the same, as he was advised that plaintiff's father could, if he pleased,

<sup>1</sup> See 5 House of Lords Cases, 83 note; 8 House of Lords Cases, 489 note.

dispose of it away from the appellant, but afterwards consented, the plaintiff being very much distressed, to lend him some money, and did lend him several small sums, amounting in the whole to 14*l.*: the plaintiff, on the 5th of May, 1838, accompanied the defendant to the office of Medland and Francis for the purpose, as he believed, of executing a contract of sale of the said estate, and did then put his mark to a paper which he believed to be an agreement for the sale of, or by which he was bound to sell, his contingent interest in the estate to the defendant: he afterwards received several small sums, making up 21*l.* from the defendant, who promised to pay him the remaining 19*l.* on the death

\* 744 of the plaintiff's father: the plaintiff's father \* died on the 19th and was buried on the 22d of September, 1840, and the defendant attended his funeral: on the 23d of September, the defendant called at the plaintiff's house to get the plaintiff to accompany him on the following day to the office of Medland and Francis: the plaintiff did so, and there, on the 24th of September, set his mark to a paper which was read over to him, and which was a contract for the sale of the said estate, the plaintiff believing it to be in pursuance of the paper to which he formerly set his mark, as before stated. The bill further alleged that, though the solicitors knew that the plaintiff had only offered in his father's lifetime to sell his contingent interest for 40*l.*, and that his interest, which was then reduced into possession, was of greater value, did not advise him to employ any other solicitor, or suggest that he might be selling the estate at too low a price, but it was arranged that he should call again finally to transfer the estate to defendant on the 3d of October, which day was afterwards postponed to the 10th, as the arrangements with the mortgagee had not been finally completed; and on the 10th of October the plaintiff was taken to the office of Medland and Francis, where he was told that 126*l.* had been paid to the mortgagee, and where he set his mark to a deed which was previously sealed, and there received the sum of 15*l.* 10*s.*, which was what then remained due of the sum of 40*l.* The bill then went on to allege that the estate was of the value of 600*l.*; that the plaintiff had acted throughout in ignorance; that the defendant had, by his representations made to others as well as to the plaintiff, induced the plaintiff and the other persons to believe that he had, in 1838, entered into a contract for the sale, from which the plaintiff could not escape; and

it set forth other circumstances, with a view to show that the sale had been obtained by misrepresentation and fraud. The bill, therefore, prayed \* that the instruments signed by the \*745 plaintiff on the 24th of September and 10th of October, 1840, might be declared fraudulent and void, and might be delivered up to be cancelled; and for an account, and for general relief.

The defendant put in answers to both the bills, in which he denied all the allegations of fraud.

Evidence was adduced on both sides, and the paper executed on the 5th of May, 1838, was shown to be a common money bond, in the penalty of 40*l.*, to secure repayment of 20*l.*, with interest at five per cent., on the 5th of November following. On the part of the plaintiff, a person named Vanstone was particularly examined to show, from repeated expressions used by the defendant, that the defendant had, at the time of the death of the plaintiff's father, spoken of himself as the person to whom the estate was sold, or "as good as sold." Contradictory evidence was given as to the value of the estate; but the defendant's witnesses themselves put it at a value considerably exceeding that for which he had obtained it.

The cause was heard before the Vice-Chancellor of England on the 14th of March, 1844, when his Honour pronounced a decree dismissing the bill, with costs. The case was heard on appeal before Lord Chancellor Cottenham, who, on the 8th of November, 1847, affirmed the decree of the Vice-Chancellor. The present appeal was then brought to this House.

*Mr. Bethell* and *Mr. Willcock*, for the appellant. — The sale here was made by the appellant under the belief that he had entered into an engagement in 1838, by which he was absolutely bound to sell on coming into possession on the death of his father. It is true that the paper executed by him in 1838 was only a common money bond; but the appellant was an ignorant labourer, who did not \* understand the difference between a \*746 money bond and an agreement to sell. He knew merely that his title to sell at that time was denied, because his father possessed the power to dispose of the estate; but he believed that he had a valuable contingent interest, and that if his father left matters as they were, the estate would come to him, and he could sell it.

Under these circumstances he applied for a loan. The loan was made, and then he signed this bond, which to him must have been quite unintelligible, and which he declares that he took to be an agreement to sell the estate whenever he should come into possession of it. He was too poor for the respondent to lend him money on his personal security, and his belief that it was lent on an agreement to sell the estate whenever possession of it enabled him to do so was therefore perfectly natural. He was not advised to consult a solicitor; but was throughout in the hands of the solicitors of the respondent, who prepared all the papers, and in whose office he signed them.

The circumstances of this case bring it within the rule settled in the case of *Attwood v. Small*.<sup>1</sup> It is not therefore necessary, as the Lord Chancellor held in the Court below,<sup>2</sup> that "to entitle the plaintiff to relief, it must appear that he has alleged and proved such a case of fraud as will justify the Court in taking from the defendant the legal title he has acquired." If the appellant has alleged and proved that he, being an ignorant man, was misled into making a sale for a very inadequate sum, known to be inadequate by those who induced him to sell, which undoubtedly he has proved, he is entitled to relief. The appellant does not allege, as the Lord Chancellor supposes, that in 1838 he entered into an absolute contract for a sale, but only that he did something \* 747 which bound him afterwards to sell, and \* which did not leave him a free agent to deal with his property as he pleased. This allegation is fully established by the evidence, and there can be no doubt whatever of the gross inadequacy of the price given for the estate.

The respondent set up in the Court below a supposed diminution of the value of the property on account of a possible claim of dower by the appellant's mother; but the evidence shows that that matter had been fully considered by the solicitors of the respondent before he was allowed to make the purchase, and that both they and he knew that no such claim was maintainable. The case is, therefore, one where a most unfair advantage, amounting to fraud, has been taken of this appellant, and he is consequently entitled to relief in equity.

*Mr. Shapter*, for the respondent. — There is no pretence for

<sup>1</sup> 6 Clark & Finnelly, 232.

<sup>2</sup> MSS.

supposing that the solicitors of the respondent used any influence whatever with the appellant to induce him to sell the estate. They prepared the necessary instruments ; but they carefully read over those instruments to the appellant, and informed him of their nature. The first offer of sale came from him. It was rejected because, as it was explained to him, his father could cut off the entail, and deprive him of all right whatever to the estate. He then got a loan of money, and gave a bond for its repayment. He afterwards renewed negotiations with the respondent, and executed an agreement to sell, and finally sold, believing at the time that his mother had a claim on the estate, which rendered it of little value beyond the amount for which it was mortgaged. There was nothing fraudulent in the whole transaction ; and the appellant cannot, because he now believes that the estate is much more valuable, claim to have the transaction set aside as fraudulent and void. The bill is improperly framed, \*and \*748 the facts do not show the appellant to have any equity on which to ask for relief on the ground of fraud.

THE LORD CHANCELLOR. — This case comes before your Lordships on an appeal against a decision of Lord Cottenham, confirming the decision of the Vice-Chancellor of England, by which the appellant's bill had been dismissed with costs.

The plaintiff in the cause endeavoured to impeach, upon the ground of fraud and misconduct on the part of the purchaser, a conveyance which he had made of a cottage and a small parcel of land to which he was entitled.

The case now comes before your Lordships upon the merits, but principally upon two allegations ; one of which is, that the Lord Chancellor misapprehended the allegations and statements in the case, and the other (which springs out of it), that he misapprehended the nature of the allegation in regard to the manner in which the plaintiff was misled ; that the Lord Chancellor supposed the plaintiff to have alleged that in point of fact he had executed a contract when he had only executed a bond ; whereas the true view of the case, and that which was alleged by the plaintiff, was not that he had executed a contract, but that he had executed a security which he thought bound him to sell the estate to the defendant.

There was a great deal, no doubt, in this case to invite the



appellant to attempt to set aside the sale. The estate (a very small property, belonging to a very poor family) was originally entailed upon the father of the appellant. That property had been mortgaged by the father for 100*l.*, and at the time when the conveyance was ultimately executed by the son, 25*l.* had been added to the 100*l.* for arrears of interest. The son, in his father's lifetime, in 1838, had taken advice, it seems, upon his own

\*749 rights, and he believed \*that he himself had a right to dispose of the estate; that as his father had not barred the entail, his father was tenant for life only of the estate; and that he, therefore, could dispose of the estate in his father's lifetime. The case is differently stated in the bill; but according to the statement in the answer, and according to the probabilities arising from the evidence of the attornies, and of the documents in the case, he offered his interest in the estate, in his father's lifetime, to the defendant, the ultimate purchaser, for 40*l.* Belworthy seems to have gone to an attorney named Medland, and to have asked him whether Curson could at that time dispose of the property, and Curson went with him. A conversation ensued upon the subject, and Belworthy was told by Medland, that the appellant had not any interest in the property. Medland happened to have a copy of the grandfather's will by him, and he saw that the father was tenant in tail, and that although the son might succeed to the estate, yet that the property was in the disposition of the father, who could dispose of it against the son and against all the issue. He told Belworthy, therefore, that Curson had not then a saleable interest. That resulted, according to the representation of the defendant, and according to the documents which were executed, in a loan from Belworthy to Curson, the son, the father being then alive, which loan was to the amount, altogether, of 20*l.* That money was advanced from time to time, and the two parties went together to the attorney, when a common printed money bond was filled up to secure 20*l.*, with interest, at a short date. There the transaction rested. It is perfectly clear from the evidence, that no communication took place either between the man who advanced the money and his own attorney, or between him and the man to whom the money was advanced, until the death of the father in 1840, when the transactions

\*750 \*occurred which I must presently go into more circumstantially.

On the 22d of September, 1840, the funeral of the father took place, and Belworthy, the purchaser, was one of the bearers at the funeral. It is manifest that a conversation arose after the funeral in regard to this property. It is very differently stated in the bill and in the answer; but the consequence was, that on the next day, the 23d of September, the purchaser and the seller went again to Mr. Medland's, and there a contract was drawn up by Mr. Medland and his partner, a clear and explicit contract, without any reference whatever to the previous bond, and that contract was afterwards executed, for the sale of the property for the sum of 160*l.*, clear, of course, of the mortgage, which was to be paid off; and the purchaser was to pay all expenses of every sort, as well those which fell upon the purchaser as those which ought ordinarily, without any stipulation to the contrary, to fall on the vendor.

It is sworn distinctly, that both upon the first occasion and upon this, the contract was read over to Curson; and the attorney swears that he was perfectly competent to understand it. He is represented by his own witnesses as a man of weak mind. I think that is not borne out by the evidence and by the circumstances of the case, and it is certainly contradicted so far as the testimony of Medland and his partner goes, and it is contradicted also by the testimony of other persons, who speak to Curson's general conduct and to his capacity in matters of business.

There the matter rested till the 10th of October, when the conveyance was executed. The conveyance was to have been executed on the 3d of October, but it was put off until the 10th, and then Curson and his wife went with Belworthy to the attorney. The conveyance was then read \* over in the presence of Curson, \* 751 of his wife, and of Belworthy. A discussion arose with reference to a claim for dower, which it had once been supposed might be made by the plaintiff's mother; but it was shown that that claim could not be made; and there being a claim on the part of Belworthy for interest on the money which he had advanced by way of loan, Curson's wife said that as there was no claim of dower existing, Belworthy had made a better bargain than he expected, and therefore she appealed to him not to charge interest; Belworthy at first declined, but at length agreed to accede to her request, and, accordingly, interest was not charged, and the contract was completed by the execution of the conveyance.

Looking at it in that way, it is as simple a transaction as ever took place, and the question for your Lordships to consider is, what weight is to be attached to the evidence which is brought forward to support the charge made by the appellant in his bill, that the transaction was a fraudulent one.

There were many circumstances here calculated naturally, as I have already said, to induce the appellant to challenge his conveyance. The appellant himself was a labourer, receiving about eight or nine shillings a week. He was an uneducated man. He could neither read nor write; and he had a wife and family to support out of his small earnings. He is represented as a man not of ordinary natural capacity; but, although that capacity had not been improved by education, he seems, according to the evidence for the respondent, to have understood what he was about.

Then it is also represented that he had no attorney. One of the attornies says he conceived that he was acting for both \*752 parties in the transaction. That I think is not made \*out.

I think the attorney for the purchaser acted for both parties without being directly and immediately consulted and confided in by the seller.

In addition to that, there is a very important circumstance, which no man who reads this evidence can possibly fail to observe. The estate was sold considerably under its value, not at such an under-value as shocks the conscience (as has been said in times long past), so that the moment you hear it stated, it makes you start and say, "This cannot have been a fair transaction"; but at such an under-value, I admit, as might, with other circumstances, be sufficient to induce the Court to set aside the contract, though there was no actual fraud proved.

I should have thought that the true way of bringing this case forward originally would have been this; that the contract was entered into improvidently, and hastily carried into execution, according to the doctrine laid down by Lord Kenyon, when Master of the Rolls, in *Evans v. Llewellyn*.<sup>1</sup> In that case the property was sold at a price greatly below its real value, and under circumstances in which the seller seemed to be in great haste to get rid of the burden of the inheritance which had been suddenly cast upon him; and looking at all the circumstances of this case, I am not pre-

<sup>1</sup> 2 Brown, C. C. 150.

pared to say, if it had been brought forward in the way I have stated, what might have been the result.

But the case has been put differently. It has been brought forward as a case of absolute fraud on the part of the purchaser, and that fraud is alleged in the clearest terms in the bill, which prays that the conveyance may be set aside for fraud; and the evidence in support of that case consists of statements which are made with a view to show that there was a fraudulent intention.

\* The whole of the case, as I understand it, is this; that \*753 with reference to the original transactions, it was represented to Curson, and he was induced to believe, that he had bound himself to a contract of sale. In order to make out this case, the allegation in the bill, as I read it, appears to me to result in this; that what turns out to be a bond was represented to be a contract of sale. There is no proof whatever of that allegation. Belworthy denies it in his answer, and it is discredited by all that appears in the evidence. There can be no question that the loan was made upon the supposition that the property would probably come to this man, because nobody can suppose that Belworthy would have advanced 20*l.* to a labourer receiving from eight to ten shillings a week, if he had not looked to the probability of the plaintiff's succeeding, at his father's death, to this property. Morally speaking, I cannot doubt that in advancing that money the defendant had in view the probability of the plaintiff ultimately becoming possessed of this property, and that the connection which the loan formed between him and Curson might lead to the result which he desired. But, as I have already observed, Belworthy had no intercourse with Curson from the very day that the bond was executed in 1838, until the death of the father in the autumn of 1840. There was no attempt to keep up an influence over him, but he was left alone with his friends to deal as he pleased with the property.

The bill having laid this foundation, and turned the bond into a contract, every thing is referred to a contract in the bill, and it being then pressed as a case in which Curson believed himself bound by a contract, and Belworthy being represented throughout the bill as urging on Curson to sell, it is stated that they go to the attorney, and that the plaintiff executed the contract, which he believed to be simply in performance of his previous

\*754 obligation to sell the \*estate. This could not be. The contract is perfectly plain and intelligible. It is exceedingly well drawn ; it is thoroughly explicit ; there is no ambiguity in it ; and every word of it was read over to him.

The bill then goes on to allege that the conveyance was executed in pursuance of a contract alleged to have sprung from, and to have been founded upon, an original obligation which was supposed to exist, but which never did exist in fact. Then there is an allegation of certain admissions made on the part of Belworthy. It is not very likely that he should have made such admissions ; but the admissions are alleged, and in point of fact are so proved by the three brothers of the appellant as to lead to the conclusion that they did not follow, but that they preceded any agreement, which was after the death of the father, to sell the estate.

Now the fact was really this, according to the statement in the answer, and certainly according to every probability in the case, that Curson having gone over to Belworthy on the 23d of September, a conversation took place between them on the subject of this property. It is sworn in the answer (though I do not take that as evidence) that Curson began the conversation about Ham, and the result was, that there was a verbal agreement entered into at that very meeting, on the 23d, to sell the estate to Belworthy, which agreement was carried into effect on the 24th by all the parties meeting at the attorney's, and executing a regular contract. Nobody would suppose that they would go to some distance to an attorney to execute a contract on the 24th, unless there had been some previous treaty. That previous treaty must have taken place on the 23d. They all went over to Crediton, to the attorney's, and waited a considerable time, while the contract was being prepared. The contract was then read over to

\*755 them, and was regularly \*executed. A treaty between the parties must of course have preceded it.

The conversations which are sworn to as having occurred after that communication between the parties, in which Curson had agreed to sell to Belworthy, are perfectly consistent with the whole case, as it appears to me, because Belworthy was then speaking to the witnesses with reference to a purchase which he had actually made ; and the expression made use of by Curson himself, which is proved by his own witnesses, strongly corroborates that view ; because, on his brother's remonstrating with him, he says, "It is

sold, or as good as sold"; a remarkable expression, easily understood when used by a person in that condition of life. If these conversations took place before the verbal agreement, it would itself have been an act of folly on the part of Belworthy, of which no man can suppose he would be guilty, because against all truth and against every thing that appears in the case, he would have been declaring that he had bought the property, when in fact he had not bought it at all.

The bill, therefore, puts the case on an untrue ground; namely, that of an attempt by Belworthy, for which there is not the slightest foundation, to represent the bond as a contract which bound this man to sell the property. It is curious enough (as was observed by the Vice-Chancellor of England), with reference to what is sworn as to the attempt to impress on the different parties what was the operation of the bond, that no man ventures distinctly to swear that that impression was conveyed to his mind.

One thing which has struck my mind very forcibly in this case is, that Curson himself was surrounded by his family. He had three brothers, Andrew, Thomas, and John, all assisting him with their advice, and all, in point \* of fact, endeavouring to persuade him not to sell this property. That one \* 756 can very easily understand. It may readily be supposed that, small as this property was, it appeared to them a crime to sell it, and that they looked with great apprehension and alarm at the entail being cut off. The brothers, therefore, were persuading him not to sell the property, and out of the advice they gave, arose a conversation in which a man named Vanstone took a considerable part; he himself, as it is said, wanting to rent this estate from the plaintiff. The plaintiff himself was a married man, and his wife seems to have been an active and vigilant woman, perfectly competent to understand business. When the conveyance was executed, she went with her husband to the attorney's. She interfered and insisted on a reduction of the charges from the purchase money; that became a matter of contest. The purchaser gave way at last, and then she made an observation which showed that they were aware it was a bargain, for she said to the purchaser, "You have got a better bargain than you thought for"; and therefore she asked that something might be struck off, which ultimately was done.

When, therefore, your Lordships consider that this man had the

assistance of his three brothers, all of whom were most anxious (as the evidence shows) that he should not complete this sale, and had also the assistance of his wife, a shrewd and vigilant woman, it is perfectly clear that there is no evidence to establish the charge made in the bill. The man was not applied to for a couple of years, and during all that time this estate, no doubt, formed the constant subject of conversation in his family. Even after his father's death he was vigilant; for it is in evidence that in fact Curson went to the mortgagee, and, before he entered into the contract for the sale of the estate, he said to Mr. Medland,

\* 757 "What shall we do if the mortgagee will not \* take his money?" Upon which the attorney said, "I shall have no objection to advance the money." So that Curson was himself taking steps to facilitate the completion of the transaction. I can well account for Curson's conduct by the circumstances in which he was unhappily placed. This small property devolved upon him. He owed 20*l.* to Mr. Belworthy; and he uses it as a badge of fraud, that no interest on that 20*l.* had been demanded from him by Belworthy, and he draws an inference from that, that the money which he had already received was given to him as part of the purchase money. It appears to me, that there is not the slightest foundation for that. No man, I think, who understands the nature of these transactions, can doubt that the money was advanced upon the probability of the estate coming to Curson; and there is no doubt in my mind, that it was so advanced to him; not from a mere regard to this man, or from a desire to assist him, but in the hope that it might lead thereafter to Belworthy's coming into possession of the estate. In those circumstances it is not at all surprising that the interest should not have been demanded. Indeed, I should have been surprised if it had been demanded. How could Belworthy have expected to get interest even on 20*l.* from a man whose weekly income did not exceed eight or nine shillings, and who had a wife and family to support? The intention no doubt was, to get it paid out of the estate if ultimately that estate should come to this man in his lifetime. I think that is shown by what took place in the attorney's office; for when the subject was first mooted, the attornies were asked whether Curson could make a title, and upon being told that he could not, Belworthy refused to purchase at that time. But he advanced as a loan a smaller sum of money, in the hope that ultimately the

estate would come to this man, and that then the purchase could be effected.

\*Looking at the whole case, my Lords, my opinion is, \*758 that there is no evidence to make out the allegation in the bill. Nothing could be more correct than the transactions as they stand upon the instruments themselves. The bond is in the common form. It is filled up in the regular way, and witnessed. It was read over to the man who executed it. With a full knowledge of what he was doing, he received the money which was secured by the bond, and he never affected to deny the debt; but allowed it to remain unquestioned. Then the contract which was entered into was also read over to him. It begins by reciting that he has now contracted to sell, not that he had contracted in 1838, to sell the property. The members of the family were talking of this contract, as is apparent from the conversations which are detailed in the evidence. This man could not neglect a day's work, and go over to the attorney's, and enter into this contract without it being the subject of conversation among his own family and neighbours; but not a word of objection is raised, and in sixteen days afterwards the contract is carried into execution by a regular conveyance.

The appellant is a pauper. The case is certainly one of hardship upon him, for this estate has been obtained for an under-value by a man of superior capacity and of higher position than himself, who may be considered, therefore, as having obtained an advantage, by securing to himself this property from one who was a pauper; but at the same time it appears to me that the appellant has failed to make out the allegations of fraud in his bill, and therefore I advise your Lordships to dismiss this appeal.

*Decree and order complained of affirmed, and appeal dismissed.*

House of Lords' Journals, 18th June, 1852.



1852. June 23, 24, 26, 29.

WILLIAM DIMES, . . . . . *Appellant.*  
 THE PROPRIETORS of the GRAND JUNCTION CANAL, }  
 T. E. SKIDMORE, A. BOHAM, and W. W. MARTIN, } *Respondents.*

*Interest of Judge. Vice-Chancellor. Enrolment of Decree. Practice.*

A public company, which was incorporated, filed a bill in equity against a land-owner, in a matter largely involving the interests of the company. The Lord Chancellor had an interest as a shareholder in the company to the amount of several thousand pounds, a fact which was unknown to the defendant in the suit. The cause was heard before the Vice-Chancellor, who granted the relief sought by the company. The Lord Chancellor, on appeal, affirmed the order of the Vice-Chancellor : —

*Held*, that the Lord Chancellor was disqualified, on the ground of interest, from sitting as Judge in the cause, and that his decree was therefore voidable, and must consequently be reversed.<sup>1</sup>

*Held*, also, that the Vice-Chancellor is, under the 53 Geo. III. c. 24, a Judge subordinate to, but not dependent on, the Lord Chancellor, and that, consequently, the disqualification of the Lord Chancellor did not affect him; but that his decree might be made the subject of appeal to this House.

Before a decree made by the Vice-Chancellor can be appealed against, it is required to be enrolled.<sup>2</sup> The enrolment is the act of the Lord Chancellor : —

*Held*, that the act of enrolment, though performed by a Lord Chancellor disqualified by interest from adjudicating in the cause, was not affected by his disqualification, but was valid for the purpose of bringing up the appeal to this House.

• THE respondents were created a corporation by the Act 33 Geo. III. c. 80.

Joseph Skidmore, since deceased, was then the owner in fee of a copyhold farm called Frogmore, and a copyhold field called  
 \* 760 Round Mead, holden of the manor of Rickmansworth, \* in the county of Herts. Round Mead and three fields, part of Frogmore Farm, were all in the line of the Grand Junction Canal, and were so described in the plans and books of reference.

<sup>1</sup> See *Egerton v. Brownlow*, 4 House of Lords Cases, 32, 240; *Ranger v. The Great Western Railway Company*, 5 House of Lords Cases, 73, 82, 88, 115.

<sup>2</sup> *Beavan v. Mornington*, 8 House of Lords Cases, 525.

A small part of each of these four fields was, in 1796, set out as necessary for making the canal and towing-path: four small angles or corners of them were thus cut off from the rest of Skidmore's lands.

The respondents, by agreement with Skidmore, the copyholder, purchased these pieces of land, containing together 3a. 3r. 17p., for 308l. 10s., which they paid him, and he then executed a deed, dated 13th March, 1797, in the form prescribed by the Act, for conveying these pieces to the respondents, and undertook to indemnify them against all quit rents, heriots, customs, and services, to be claimed by the lord in respect of the lands so purchased. The respondents, with the concurrence of Edward Fotherley Whitfield, Esq., the then Lord of the Manor of Rickmansworth, took possession of the strips and corners of land, made the canal and towing-path along them, and sold so much of them as was not wanted for the purposes of the canal to Mr. Boodle, in trust for Earl Grosvenor, and Mr. Boodle was admitted on the rolls as tenant. Skidmore continued on the rolls as tenant of the other lands.

The canal was completed and opened for public traffic early in 1797. From that time until the commencement of the appellant's proceedings, the respondents and their assigns had had uninterrupted possession of these pieces of land.

Whitfield died in 1813, and in 1831 the appellant became the purchaser of the manor.

In May, 1835, Joseph Skidmore died intestate as to lands vested in him as a trustee for the respondents, leaving Thomas Emmett Skidmore, then a minor, his customary heir.

Proclamations were then made in the Manor Court for the person entitled to admittance to come in and be admitted

\* in respect of the lands forming part of the canal, but no \*761 one appeared in pursuance of such proclamations. The appellant, as Lord of the Manor of Rickmansworth, then issued a warrant to the bailiff to seize the land, and brought an action of ejectment against the respondents; but on the trial before the late Lord Chief Baron Abinger, at the Summer Assizes, in 1836, for Hertfordshire, he was nonsuited, on the ground that the statutory assurance of the 13th March, 1797, operated to vest the freehold and inheritance in fee of the 3a. 3r. 17p. in the respondents. Liberty was, however, given to the appellant to move the Court of King's Bench to set aside the nonsuit, and enter a verdict in his

favour. He accordingly obtained a rule *nisi* for this purpose in November, 1836, and, on argument, this rule was made absolute on the 7th June, 1838, on the ground that the respondents had acquired an equitable estate only in the land as copyhold.

The appellant having obtained possession under a writ of possession, placed a bar across the canal, and threw a large quantity of bricks into the canal to prevent the passage of barges; and on the 14th June, 1838, threatened wholly to stop the navigation, unless the respondents immediately paid him 5000*l.*; and on the 18th June, 1838, increased his demand to 5500*l.*

The respondents, on the 18th June, 1838, filed their original bill in this suit against the appellant, and also against the respondent Skidmore, seeking admission to this part of their canal and towing-path, as copyhold, and praying an injunction against the appellant's interference with the navigation. This injunction was, on the same day, applied for *ex parte*, and was granted by the late Vice-Chancellor of England for a few days, with liberty to give the appellant notice of motion for continuing the injunction. This

notice was given, and, after full argument, his Honour, on \* 762 the 26th July, 1838, made an order, continuing \* till further order the injunction, on the terms of the respondents paying 1050*l.* into Court as a security for the fine to become due on the admittance of the respondent Skidmore. This sum was accordingly paid into Court.

The appellant, in December, 1838, moved before the then Lord Chancellor Cottenham to discharge the order of the 26th July preceding; and his Lordship, on the 15th December, varied that order, by directing that the 1050*l.* should be a security for the fine on the admittance of any copyhold tenant the Court might be of opinion ought to be admitted, and, by his Lordship's direction, to prevent the course of the canal from being changed, the respondents undertook that the fine should be according to the then present value of the property. The injunction accordingly issued on the 6th July, 1839.

The bill was amended in the year 1840, and again in April, 1841; before which latter amendment, Boham had given notice that the appellant was a mortgagee in possession, under a mortgage from one William Windale, and was overpaid by his receipt of rents and profits, and had made some agreement for the purchase of the equity of redemption, and was largely indebted to

Boham, or to Martin, as owner, under Windale's will, of the equity of redemption of the manor.

The respondents, accordingly, in June, 1841, re-amended their bill, and made the respondents, Boham and Martin, defendants. The appellant, by his answer to the re-amended bill, alleged that he had, in November, 1841, obtained an order of the Court of Chancery, foreclosing Boham and Martin's equity of redemption.

The appellant brought an action against the respondents for mesne profits, and a special verdict was taken at the trial, on the argument of which the Court of Queen's Bench (31st May, 1844) decided against the appellant, on the \*ground that \*763 the respondent Skidmore, being an infant, was within the protection of the Act of Parliament, 1 Wm. IV. c. 65. This Act having received a different construction in the Court of Exchequer, in the case of a married woman,<sup>1</sup> the appellant brought a writ of error in the Court of Exchequer Chamber, and the judgment of the Court of Queen's Bench was there reversed.<sup>2</sup>

No further proceedings were taken at law, but the suit (which had been from time to time ordered by the Vice-Chancellor of England to stand over, that the result at law might be known) was brought to a hearing before his Honour, who, on the 16th November, 1846, made a decree, by which it was declared that the respondent T. E. Skidmore, as customary heir of J. Skidmore, ought to be admitted tenant to the copyhold premises in question in the cause, and that when admitted he should hold the premises as a trustee for the respondents; and it was declared that they ought to pay the fine and fees on such admission: it was referred to the Master to ascertain and settle the amount of the fine and fees, having regard to the custom of the manor of Rickmansworth; and on payment or tendering of what should be certified by the Master as a proper fine and proper fees, it was ordered that Skidmore should be admitted tenant of the said copyhold premises accordingly; and it was ordered that the respondents' bill should be dismissed as against Boham and Martin, and that the appellant should pay to the respondents their costs, and also what they should have paid to Skidmore, Boham, and Martin in respect of their taxed costs, with usual directions for the production of documents and examination of parties; and it was ordered that the

<sup>1</sup> Doe d. Twining v. Muscott, 12 Meeson & Welsby, 832.

<sup>2</sup> 9 Q. B. 469.

injunction issued in the cause pursuant to the order dated  
 \* 764 the 18th June, 1838, \* and continued by orders dated the  
 26th July, 1838, and the 15th December, 1838, should be  
 made perpetual; and any of the parties were to be at liberty to  
 apply to the Court, as there should be occasion.

The appellant then presented a petition of rehearing. The  
 cause was set down for rehearing before the late Lord Chancellor  
 Cottenham, who, on the 27th January, 1848, after argument, and  
 time taken to consider, affirmed the decree of the Vice-Chancellor  
 of England.<sup>1</sup>

Shortly after this order, the decree was carried in before the  
 Master, together with states of facts as to the custom of the manor,  
 and the amount of the fine and fees to become due on Skidmore's  
 admittance. The Master, on the 9th July, 1850, reported that the  
 fine and fees payable on the admission of Skidmore would amount  
 to 397*l.* 12*s.* 4*d.*, and appointed a time and place for the payment  
 thereof. The appellant failed to attend at the time and place ap-  
 pointed to receive the fine and fees thus ordered to be paid.

The appellant, as he alleged, had then discovered that the Lord  
 Chancellor, Lord Cottenham, was, and for more than ten years had  
 been, a holder, partly in his own right, and partly as a trustee for  
 other persons, of ninety-two shares in the company; and there-  
 fore, on the 24th February, 1849, gave the respondents notice of a  
 motion on his behalf to discharge the order of the 27th January,  
 1848, and for an order on some minor points, including liberty to  
 amend his petition of rehearing, and that his petition, when  
 amended, might be restored to the Lord Chancellor's paper of re-  
 hearings and appeals, and that proper directions might be given by  
 the Court of Chancery by issuing a commission, or otherwise as  
 might be necessary, for the hearing and determination of  
 \* 765 his petition before the Master of the \* Rolls, assisted by two  
 Judges of her Majesty's Courts of Common Law at West-  
 minster.

This motion was, by desire of the late Lord Chancellor, heard  
 before the then Master of the Rolls, who, after taking time for  
 consideration, on the 23d May, 1849, stated that his advice to the  
 Lord Chancellor was to refuse the motion with costs, and, at the  
 same time, gave his reasons at large for this advice.<sup>2</sup>

The appellant then gave notices to the respondents, and to

<sup>1</sup> 17 Law Journal N. S. Chanc. 206.

<sup>2</sup> 12 Beavan, 63.

bargemen navigating the part of the canal through the copyhold land in question, that he should treat all persons engaged in the navigation as trespassers; and on the 26th May, 1849, he commenced fifteen actions of trespass. These proceedings were met, on the part of the respondents, by a notice of motion, dated the 28th May, 1849, to commit the appellant for a breach of the injunction issued on the 6th July, 1839, and made perpetual by the decree of the 16th November, 1846; and for a fresh injunction to issue, restraining the appellant, his attornies and agents, from all proceedings in his fifteen actions of trespass, or any of them, and from commencing or prosecuting any other action or actions or proceedings at law against the proprietors, or any other person or persons, in relation to the copyhold premises mentioned in the decree. On the 30th May, 1849, the appellant gave a cross notice of motion to take the company's bill off the file. These motions were made (in accordance with the notices given to the respective parties) before the late Vice-Chancellor of England on the 2d June, 1849, when his Honour refused the appellant's motion, and likewise declined to commit the appellant, but granted the injunction sought by the company's motion.<sup>1</sup> This injunction issued on the 5th June, 1849.

On the 30th November, 1849, the appellant placed a \*chain across the canal, and dug a deep trench across the \*766 towing-path, and impeded the navigation, and wrote two letters to the solicitors of the proprietors, explaining his conduct as an exercise of his legal rights, and asserting his determination to continue to impede the navigation of what he called his own canal. On the 10th December, 1849, the late Vice-Chancellor of England, on the motion of the company (of which notice had been given on the 3d December), ordered the appellant to stand committed to the custody of the keeper of the Queen's Prison till further order, for his contempt in disobeying the writ of injunction of the 6th July, 1839.

In pursuance of this order, the usual warrant was, on the 11th January, 1850, made out by the officer of the Court, and signed by the then Lord Chancellor, authorising the tipstaff of the Court to arrest the appellant, and convey him to the Queen's Prison, there to remain till further order; the tipstaff accordingly arrested the appellant, and conveyed him to the Queen's Prison.

<sup>1</sup> 17 Simons, 38.

The appellant, on the 28th January, 1850, gave notice of a motion to discharge the Vice-Chancellor's order of the 10th December, 1849, and seeking to have his notice of motion of the 24th February, 1849, finally disposed of, and that an order might be made pursuant to the terms thereof; or that the Vice-Chancellor's order of the 2d June, 1849, refusing the appellant's motion, might be discharged; or that the company's bill might be taken off the file, with costs, to be paid by the respondents; or that all further proceedings might be stayed. The then Lord Chancellor having requested the assistance of the then Master of the Rolls, this motion was made before their Lordships, and fully argued by the appellant's counsel on the 4th and 6th February, 1850. Without hearing the other side, the Master of the Rolls repeated and \*767 adhered to \*the advice he had given to the Lord Chancellor in May, 1849; and, in conformity with his Lordship's advice, orders of the Court were made by the Lord Chancellor, refusing with costs the appellant's motion under his notice of the 24th February, 1849, and his motion under the notice of the 28th January, 1850.<sup>1</sup>

On the 26th July, 1850, the appellant was released from custody by Lord Chancellor Truro, the company consenting, and the appellant undertaking not again to violate the injunction.<sup>2</sup>

The appellant brought the present appeal against the decree of the 16th November, 1846, and the nine several orders of the Court of Chancery, dated respectively the 18th June, the 26th July, and the 15th December, 1838; the 27th January, 1848; the 2d and 3d June, and the 10th December, 1849; and the 4th and 6th February, 1850.

The House desired that in the first instance the question of the competency of Lord Chancellor Cottenham to hear and decide the case should be discussed.

*The Solicitor-General and Mr. Smythies (Mr. Selwyn was with them) for the appellant.* — There is no doubt of the fact that, at the time of filing this bill, Lord Chancellor Cottenham was the holder of shares in this company; that fact rendered him incompetent to hear and decide the suit, and his incompetency affected the Vice-Chancellor, who was his deputy. There was therefore no

<sup>1</sup> 2 Macnaghten & Gordon, 285.

<sup>2</sup> 3 Macnaghten & Gordon, 4.

valid jurisdiction in this case, and the whole proceedings in Chancery were incompetent and void. When the fact was discovered by the appellant, and the matter was brought before the Court, the Master of the Rolls \* declared his opinion that \* 768 the interest of the Lord Chancellor as a shareholder in the company did not constitute an objection to his deciding on a matter in which that company was a litigant party.<sup>1</sup> Such a doctrine cannot be maintained. It is competent for any suitor in the Court, if he finds that the Judge who is at the head of the Court is himself largely interested in the question pending before it, to call on him to abstain from acting. The principle of the law is, that no man shall be a judge in his own cause; and it is for the interest, not only of the people, but of the Judges themselves, that that principle should be strictly enforced. Here the interest was such as the law took notice of; and if the proprietors had not been incorporated, Lord Cottenham must have been named as a party on the face of the proceedings. The objection, therefore, affects the whole of the proceedings, and Lord Langdale himself, throughout his judgment, admitted that there was no difference for this purpose between the Lord Chancellor and the Vice-Chancellor. Yet he justified what had been done on the ground of necessity, saying that unless the cause could be heard as it had been, there would be a failure of justice. That proposition is demonstrably incorrect.

[THE LORD CHANCELLOR. — Your argument puts you in a singular position. You come here in consequence of the enrolment of the decree by the Lord Chancellor. In asking for the enrolment, you ask for his interference as Lord Chancellor. Yet you say that the whole proceeding in Chancery is void, on account of his interference, he being incompetent or disqualified by reason of interest. LORD BROUGHAM. — Your only means of objecting to his acting as Lord Chancellor, is by an act done by him as Lord Chancellor.]

That seems a difficulty, but it is not one. The enrolment \* of this order is a matter of necessity, but it is also a \* 769 matter of form, and is not an act which decides the case, but only enables the party to make the decision the subject of an appeal. The House cannot say to an appealing party who complains of the wrongful exercise of an unwarranted jurisdiction,

<sup>1</sup> 12 Beavan, 63.



that he cannot come here to make the complaint without getting the Lord Chancellor's signature, and yet, when he gets it, that he thereby admits the jurisdiction. That would be to make the wrong itself a reason for refusing the remedy. Here, too, the Lord Chancellor had heard the case before the objection to his deciding it was known; and all that his signature to the enrolment can be said to amount to, is a formal declaration that what he signed was a final decree and judgment.

[LORD BROUGHAM. — You admit, of course, that he must sign the enrolment; but if he was an interested party, he might be interested in preventing the appeal, and he might refuse to enrol the decree.]

That he might act wrongfully, even in the discharge of that formal duty, is not a reason to show that he has any actual jurisdiction in the case. The interest of the Lord Chancellor in the company was very considerable, and in his judgment, delivered in December, 1838, he stated that if he gave a judgment for the plaintiff, the company "must be entirely at the mercy of the lord of the manor." Of the company placed in that situation he was at that moment a large shareholder. The Master of the Rolls,<sup>1</sup> however, put the whole case on the ground of expediency; he says that "there is no question as to the validity and importance of the general rule," but that cases may arise in which it must give way to circumstances and to the necessity of avoiding a failure of justice. Admitting that observation to be correct in some \* 770 cases, it is inapplicable here. There \* need not have been a failure of justice here, for the Master of the Rolls himself pointed out<sup>2</sup> a course that might have been pursued, by which the interference of the Lord Chancellor with the case might have been wholly avoided. There might have been a bill of complaint addressed to the Sovereign in the High Court of Chancery, and it would have been referred to the Master of the Rolls, and the judgment enrolled as the decree of the Sovereign in Chancery.

[THE LORD CHANCELLOR. — Would you have said that, in the actions arising out of Fauntleroy's forgeries, a Judge who held Bank shares ought not to have sat?]

Certainly. The illustration given in the Court below of officers of the British Museum does not apply; for, as such, they have no

<sup>1</sup> 12 Beavan, 77.

<sup>2</sup> 12 Beavan, 78.

personal interest. But in questions relating to Bank of England shares and East India stock, a Judge who holds such stock, and has a pecuniary interest in the matter in issue, ought not to sit. This principle has been applied in *The Queen v. The Commissioners for the Paving of Cheltenham*,<sup>1</sup> though there the commissioners were only rated to the amount of a few shillings.

[THE LORD CHANCELLOR. — Suppose a Judge was a holder of stock in the Three per Cents, and he was called on to decide a question which might affect the funds from which the Three per Cents were paid, would you say that he could not sit?]

It is difficult to suppose a case where he could have any measurable interest in such a question. But here the Lord Chancellor was a party to the suit, and had a direct and a considerable interest in the result of it.

[LORD BROUGHAM. — Suppose he had been a trustee alone?]

As such he would not have had any interest whatever. The Master of the Rolls assumed throughout his judgment

\* that no interest would disqualify a Judge unless he was a \*771 party to the record. That doctrine is erroneous, and would lead to absurd and mischievous consequences. If it exists as to Courts of Equity, it must exist as to Courts of Law. What would be the consequence of it there? Take the case of an action of ejectment which might be brought for the whole estate of the Judge, and yet he might not be a party to the record. If the rule stated by the Master of the Rolls was true, the Judge really interested might, in consequence of not being named, try the action which involved his whole fortune. It is utterly impossible to maintain such a proposition. The same remark may apply to a suit in equity. Suppose a Lord Chancellor to be the only remaining member of an incorporated company, all the others having died, — suppose him to file a bill, his name would not appear as plaintiff, the incorporated company would be the plaintiff, and according to the doctrine stated in the Court below, he might sit to decide the cause on the very bill which he himself had filed. Before Lord Denman's Act he would have been disqualified as a witness; even now he could not sit as a jurymen, and yet he is supposed to be entitled to make this decree as a Judge. It is clear that no principle of law or of reason can be cited in support of such a doctrine.

<sup>1</sup> 1 Q. B. 467.

Nor do the authorities, either of text-books or of decided cases, justify it. Some of the text-books suggest the very mode of proceeding which ought to have been adopted in this case, and which was also referred to in the judgment of the Master of the Rolls.

In Mitford on Pleading, the jurisdiction of the Court of Chancery is spoken of as one of the means of securing the due administration of justice. It is said that<sup>1</sup> “a suit to the extraordinary \*772 jurisdiction of the Court of Chancery, on \*behalf of a subject merely, is commenced by preferring a bill in the nature of a petition to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal, or to the King himself in his Court of Chancery, in case the person holding the Seal is a party, or the Seal is in the King’s hands”; and various authorities are quoted for this proposition.<sup>2</sup> *Praxis Angliæ Cancellariæ*<sup>3</sup> is to the same effect; and in Viner’s Abridgment<sup>4</sup> it is said that the Chancellor himself (16 Edw. IV. 4 b.) may have relief there, “but he cannot make a decree in his own cause”; and the case of *Sir John Egerton v. Earl of Derby*<sup>5</sup> is cited. There a proceeding took place in Chancery between Sir John Egerton, plaintiff, and William, Earl of Derby, chamberlain of Chester, and others, defendants, for the trust and interest of a farm, and it was resolved by the Lord Chancellor, the Chief Justice of England, and the Master of the Rolls, Doderidge and Winch, Justices, “That the Chamberlain of Chester, being sole Judge of Equity, cannot decree any thing wherein himself is party, for he cannot be a Judge *in propria causa*; but in such case where he is party, the suit shall be heard in the Chancery *coram Domino Rege*.” In an anonymous work of great authority,<sup>6</sup> the same rule is laid down.

The same rule was likewise declared in the *Mayor of Hereford’s Case*,<sup>7</sup> *Brookes v. The Earl of Rivers*,<sup>8</sup> \* *Bridgman v.*

<sup>1</sup> Page 6, 4 ed.

<sup>2</sup> Chancery, L.

<sup>3</sup> 4 Vin. Abr. 385.

<sup>4</sup> 12 Rep. 114.

<sup>5</sup> Page 461.

<sup>6</sup> Legal Judicature in Chancery, 44, 255, 258. (The author of the book here referred to states that, “in cases where the Lord Chancellor himself is a party, the decree must be signed by the King himself; and the enrolment conclude thus: ‘It is ordered and adjudged by the King’s most excellent Majesty in his High Court of Chancery, that,’” — pp. 256, 257.)

<sup>7</sup> 1 Salk. 396.

<sup>8</sup> Hardres, 503.

*Holt*,<sup>1</sup> *The King v. Yarpole*,<sup>2</sup> *Great Charte v. Kennington*,<sup>3</sup> *The King v. The Justices of Essex*,<sup>4</sup> and in Rolle's Abridgment.<sup>5</sup> So strongly is it a settled principle of constitutional law that a man cannot be Judge in his own cause, that in *Day v. Savadge*,<sup>6</sup> it was said that "even an Act of Parliament made against natural equity, as to make a man a Judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*." The rule has been declared in *Bonham's Case*,<sup>7</sup> and was also held in that of the *City of London v. Wood*,<sup>8</sup> where the proceeding was an action of debt for a fine brought in the Lord Mayor's Court, for refusing to serve the office of sheriff, and there, though the Lord Mayor's interest in the fine was indefinitely small, it was held that the action could not be maintained in the Court of which he was even nominally the chief Judge. It was proved there that the Lord Mayor did not in fact sit in the Court, but that the sittings were held before the Recorder; but because he was called the Judge of the Court, it was held that his Court had no jurisdiction in the case; the deputy could not act where the principal was disqualified; and that rule is as applicable to the Lord Chancellor's deputy the Vice-Chancellor, as it is to the Lord Mayor's deputy the Recorder. In an anonymous case, Lord Holt said that the Mayor of Hereford was laid by the heels for sitting in judgment in a case in which he was himself lessor of the plaintiff on ejectment, though by the charter he was sole Judge of the Court.<sup>9</sup>

<sup>1</sup> Shower, P. C. 111.

<sup>2</sup> 2 Roll. Abr. 92, tit. Judges, A, pl. 11.

<sup>3</sup> 4 T. R. 71.

<sup>4</sup> Hobart, 85, 87.

<sup>5</sup> 2 Strange, 1173.

<sup>6</sup> 8 Rep. 118.

<sup>7</sup> 5 Maule & Selwyn, 513.

<sup>8</sup> 12 Mod. 669, 686, et seq.; see 2 Brown, P. C. 409.

<sup>9</sup> 1 Salk. 396. Lord Holt also referred to the instance of a proceeding against the Mayor of Hereford, for acting as Judge in his own cause, in an anonymous case in 1 Salk. 201, and likewise in a case of *Wright v. Crump* (2 Lord Raymond, 766), where alone the circumstances of the Mayor of Hereford's Case are stated. "And Holt, C. J. upon this motion cited a case to have been adjudged in B. R. when Hyde was Chief Justice, which was thus. The Mayor of Hereford claimed a title to a house in Hereford, and in order to recover it he made a lease of it to J. S., to the end that he should sue an ejectment, which J. S. did accordingly in the Mayor's Court in Hereford, and so the Mayor in effect was Judge in his own cause, and he gave judgment for his lessee, and execution was sued there by him; and upon complaint of this matter in B. R. the Court here granted an attachment, and committed the Mayor for these proceedings." See also the case

\* These cases, and the declarations made in them, have \*774 met with the warm approval of some of the most distinguished foreign jurists. Thus Chancellor Kent, in his *Commentaries*.<sup>1</sup> After stating that it is a principle of the English law that the will of the legislature is the supreme law of the land, and demands proper obedience, he says: "But while we admit this conclusion of the English law, we cannot but admire the intrepidity and powerful sense of justice which led Lord Coke, when Chief Justice of the King's Bench, to declare, as he did in *Dr. Bonham's Case* (8 Rep. 118), that the common law doth control Acts of Parliament, and adjudges them void when against common right and reason. The same sense of justice and freedom of opinion led Lord Chief Justice Hobart, in *Day v. Savadge* (Hob. 87), to insist that an Act of Parliament made against natural equity, as to make a man a Judge in his own case, was void; and induced Lord Chief Justice Holt to say, in the case of the *City of London v. Wood* \* (12 Mod. 687), that the observation of Lord Coke was not extravagant, but was a very reasonable and true saying."

The principle thus stated must therefore be considered to be fully established, and its application cannot be doubted. But should it be said that in some of the cases now quoted the decision appears to have taken place without argument, the case of *The Queen v. The Cheltenham Commissioners*<sup>2</sup> furnishes an answer to that observation. In that case a local Act empowered commissioners to lay rates, and gave to parties grieved an appeal to the Quarter Sessions, whose order was to be final, and no *certiorari* was to be allowed. On an appeal, the magistrates at Sessions admitted, by a majority of eleven to eight, certain evidence which the respondents had objected to; three of the eleven magistrates were partners in a company to which belonged premises assessed to the rate in the name of the occupier. The rate was quashed, but the Court of Queen's Bench held that a question in the cause having been decided by a Court improperly constituted, on account of the interest of the three magistrates, the clause prohibiting the *certiorari* did not operate, and the order was brought up,

of Foxham Tithing (2 Salk. 607), where an order of Sessions was quashed because one of the justices was surveyor of the highway, and he joined in making the order, and his name was put in the caption.

<sup>1</sup> Vol. I. p. 420.

<sup>2</sup> 1 Q. B. 467.

and although the affidavits did not satisfy the Court that the magistrates had acted partially, the order of Sessions was quashed. *The King v. The Inhabitants of Rishton*<sup>1</sup> is to the same effect, and so is *The Queen v. The Justices of Hertfordshire*,<sup>2</sup> where the Court distinctly refused to enter into the question as to the extent of influence exercised by the interested party. The principle thus applicable in the case of a Judge has been acted on by the Court of Exchequer in a civil case with regard to jurymen. In *Esdaile v. Lund*,<sup>3</sup> the plaintiffs represented the London and Westminster Bank, and in an action brought on a judgment \* against \* 776 the defendant, the Court of Exchequer compelled the plaintiffs to undertake to strike out of the list of special jurymen any who might be shareholders in the banking company. The reason for the rule is stronger in the case of a single Judge than of an individual jurymen. It has likewise been acted on in Chancery. In *Lord Mostyn v. Spencer*<sup>4</sup> depositions were suppressed after publication, on the ground that one of the commissioners was the nephew and agent of the plaintiff, and it was held that the fact of the publication having passed, or the death of the witness, would not prevent the suppression of the depositions. That is a very strong case ; for under such circumstances the evidence given in that deposition could never be supplied.

The codes of other nations, ancient and modern, have adopted the same principle. In Justinian's Institutes<sup>5</sup> the rule is laid down, and it has been embodied in the French Code de Procédure Civile,<sup>6</sup> and in the code of New York, promulgated in January, 1850.<sup>7</sup> No exception is made in any of these laws on the ground of any supposed necessity for the Judge's sitting because he is the only Judge of the Court. So that, if there had been any such necessity, which there was not, the rule would still have been applicable.

The proceedings here are altogether void, and the decree must on that ground be reversed.

*Mr. Stuart* and *Mr. Bethell* for the respondents. — It is assumed on the other side that the bill in this case was improperly ad-

<sup>1</sup> 1 Q. B. 479 note.

<sup>2</sup> 6 Q. B. 753.

<sup>3</sup> 12 Meeson & Welsby, 734.

<sup>4</sup> 6 Beavan, 135.

<sup>5</sup> Book IV. tit. 5, law 1.

<sup>6</sup> Part 1, book 2, tit. 21, art. 378.

<sup>7</sup> C. 16, art. 3, § 188.

dressed to the Lord Chancellor, and that being so, that all  
 \*777 the subsequent proceedings were void. \* But that argument goes much too far. It cannot be pretended, that if Lord Cottenham had ceased to hold the Great Seal before the hearing, the fact of the bill being addressed to him would have affected the validity of the decision of his successor. The mode of addressing the bill has therefore nothing to do with the question. But perhaps it will be said that that argument is advanced as applicable, not to the successor of the Lord Chancellor, but to his deputy while he shall hold the office,—and it will be contended that the Vice-Chancellor is his deputy. Even that, however, involves a consequence which defeats this appeal, for if nullity runs through the whole proceeding, the decree and the enrolment of it must be affected with that nullity, and then this appeal cannot be sustained. But supposing the Lord Chancellor to be incompetent, his incompetence does not disqualify the other Judges of the Court any more than the address of the bill could of itself affect the proceedings, so as to make them void. The Vice-Chancellor is not the mere deputy of the Lord Chancellor, but is, by virtue of the Statute 53 Geo. III. c. 24, § 2, an independent, though subordinate, Judge of the Court, and his decision is not affected by any objection applicable personally to the Lord Chancellor. At most, therefore, there can only have been an irregularity here, and an irregularity may be waived.

The general doctrine for which Rolle's Abridgment has been quoted,<sup>1</sup> that a man cannot be a Judge in his own cause, may be admitted; and further, it may even be admitted, for the sake of argument, that that general doctrine applies, whether he is named or not on the record; but all the cases quoted are those of inferior jurisdictions, whence there was an appeal, or of Courts where there were many members composing them, so that it was not a matter of necessity to resort to the decision of the individual who might happen \* to have an interest in the question  
 \*778 discussed. But where such a necessity exists, it is above all rules of proceeding; and that was the opinion of Lord Langdale, whose judgment was founded on a full consideration of all the authorities. In *The King v. The Justices of Essex*,<sup>2</sup> this rule of necessity was recognised and acted on; and as corporation justices were few in number, it was held that, where they consisted

<sup>1</sup> 2 Roll. Abr. tit. Judges, 11.

<sup>2</sup> 5 Maule & Selwyn, 513.

of more than four, an appeal lay to them at sessions against a poor rate, although there might be less than four who were devoid of interest in the question. In like manner, in *Markwick v. The City of London*,<sup>1</sup> it was held that an appeal properly lay from the Sheriffs' Court in London to the Court of Hastings, though the Lord Mayor was the chief Judge of the Court, and the action was brought on a bond given to the Lord Mayor, who was plaintiff in the original cause.

The difficulty of entertaining the objection here raised is great, for it cannot be entertained without discussing what amount of interest is sufficient to disqualify a Judge. Such a question could hardly be satisfactorily settled. Take an instance. The salaries of the Judges are payable out of the Consolidated Fund. Suppose a very large sum has long remained in Consols unclaimed by any one, and so augmenting the funds of the country; but, suppose, also, an individual should appear and claim to have that sum transferred to him, — could any of the Judges try his right, the salaries of all of them being paid out of those funds? According to the argument on the other side, no Judge could try it. Suppose, again, a legacy left to a Judge under a will, — would he be thereby rendered incapable of deciding a question on the administration of the trusts of \* that will, some of which might \* 779 relate to railway shares, India bonds, and insurances, out of the proceeds of which the legacies are to be satisfied? During what time is the disqualification to continue? Is the Judge to be disqualified while his legacy remains unpaid, and is he to become qualified the moment that that legacy has been satisfied? To maintain the affirmative would be to introduce great inconvenience into the business of life, and to occasion great delay, if not denial, of justice. The House cannot derive much aid from the rules of the common law on this subject, for remote equitable interests are not considered in those rules, which only deal with direct pecuniary gain or loss by the result of the case. Nor do indirect equitable interests seem in practice to have been regarded in the Court of Chancery. There is no instance of a bill being addressed to the Sovereign in Chancery, except where the Lord Chancellor himself was a party to the suit, in the character of plaintiff or defendant; and that is the only case to which Lord Redesdale refers,

<sup>1</sup> 2 Brown, P. C. 409. This is evidently a continuation of the case of the City of London v. Wood, 12 Mod. 669.



and to which, therefore, it must be considered that he carefully and purposely confined his attention. No other text-book uses language of a different kind ; and it may therefore be taken that the limit of direct interest as a party is that to which the rule is confined. In the treatise of " Discourses on Subjects of Law and Equity,"<sup>1</sup> it is said : " No man can be both Judge and suitor ; and therefore, if the Lord Chancellor be a suitor, he must direct his bill to the King's Most Excellent Majesty in his High Court of Chancery " ; a statement which exactly corresponds with that of Lord Redesdale, and, like it, confines the rule to the case where the Lord Chancellor is a " suitor." The same rule, with the same limitation, is laid down in Giles's Jacob's Complete Chancery Practitioner. The argument on the other side is, that all the

\* 780 difficulties might be removed \* if the record was addressed to the Queen in Chancery ; but that argument assumes that the whole proceeding might then be carried through the Court of Chancery, to this ultimate tribunal of appeal, without any intervention of the Lord Chancellor. That assumption is not warranted by the language of the statute,<sup>2</sup> under which the Vice-Chancellor is appointed. The Lord Chancellor may direct and regulate the

<sup>1</sup> Page 44.

<sup>2</sup> 53 Geo. III. c. 24, § 2. " Such Vice-Chancellor shall have full power to hear and determine all causes, matters, and things which shall be at any time depending in the Court of Chancery of England, either as a Court of Law or as a Court of Equity, or incident to any ministerial office of the said Court, or which have been or shall be submitted to the jurisdiction of the said Court, or of the Lord Chancellor, Lord Keeper, or Lords Commissioners, &c. for the time being, by the special authority of any Act of Parliament, as the Lord Chancellor, &c. shall from time to time direct. And all decrees, &c. of such Vice-Chancellor shall be deemed and taken to be, as the nature of the case shall require, decrees, &c. of the said Court of Chancery, or of such incident jurisdiction as aforesaid, or under such special authority as aforesaid, and shall have force and validity, and be executed accordingly ; subject, nevertheless, in every case, to be reversed, discharged, or altered by the Lord Chancellor, &c. for the time being : and no such decree or order shall be enrolled until the same shall be signed by the Lord Chancellor, &c. for the time being."

Sec. 3. " Such Vice-Chancellor shall sit for the Lord Chancellor, Lord Keeper, or Lords Commissioners, &c., whenever they shall respectively require him so to do ; and shall also, at such other times as the Lord Chancellor, &c. shall direct, sit in a separate Court, whether the Lord Chancellor, &c. shall be sitting or not ; for which purpose the said Lord Chancellor, &c. shall make such orders as to them respectively shall appear to be proper and convenient, from time to time, as occasion shall require."

cause paper of the Vice-Chancellor, but the latter receives from the statute his authority to decide on the causes put in that paper.

There has not been here any substantive decision of the Lord Chancellor, of which this appellant has a right to complain.

\*The order on the rehearing was made by the Lord Chan- \*781 cellor ; but that rehearing was on the petition of the appellant himself, who must be thereby taken to have waived any irregularity in the proceedings; and the Lord Chancellor, on that rehearing, merely affirmed what had been done in the Court below. It is the Vice-Chancellor's decree, therefore, which is under appeal, and that is the decree of an independent Judge. *The Earl of Derby's Case*<sup>1</sup> does not apply, for there the Earl of Derby, who was Chamberlain of Chester, sat as such to try a cause in the County Palatine, in which cause he was himself a party to the record. There could be no doubt that such a proceeding was erroneous, and there was no necessity for it, for the cause could have been brought in the Court of Chancery, where, in fact, the Judges determined that it ought to be heard.

The argument on the other side defeats itself; for if every act of the Lord Chancellor is void, then the enrolment is void, and without an enrolment there can be no appeal. Enrolment of a decree of the Vice-Chancellor is only necessary when the decree is to be brought to this House; but that enrolment is a mere form on the part of the Lord Chancellor, in order to make the decree the subject of appeal; it certainly gives no validity to the decree. Still, the application for enrolment is an admission of jurisdiction.

*The Solicitor-General*, in reply. — There can be no distinction in a matter of this kind between proceedings at common law and in equity. There can be no pretence of necessity in one instance more than in another. Had this been a case at law, and had a juryman been thus interested in the suit, the Judge would not have allowed him to sit in the box; had the Judge himself been \*interested, he would have declined to try the cause. \*782 That would be the case in an action of ejectment, though the nominal plaintiff, John Doe, and the tenant in possession, would have been the only parties named on the record. The

<sup>1</sup> 12 Rep. 114.

maxim that a man must not be a Judge in his own cause does not apply merely to a cause where he is named as a party. Suppose a case relating to the Bridgewater Canal. The company there is incorporated; but nineteen twentieths of the shares belong to the Earl of Ellesmere; could he, if he held the office of Lord Chancellor, hear such a case, merely because he was not named on the record? He could not. The case of *Brookes v. Rivers*<sup>1</sup> shows that interest in the subject matter of the suit, not the fact of being named on the record, constitutes the objection.

[THE LORD CHANCELLOR. — The argument now is this: conceding that interest disqualifies the Lord Chancellor from being a Judge, here is the decree of the Vice-Chancellor, and the judgment of the Lord Chancellor left that decree as it stood before; and as the enrolment was made on the application of the appellant, he has nothing to complain of, for the record stood as it was before the judgment of the Lord Chancellor was pronounced upon it.]

That is not sufficient. The proposition on the part of the respondents is, that if the Judge in question has the sole and exclusive jurisdiction, it would be a denial of justice to say that in any case where he has an individual interest he cannot sit as Judge; but that proposition is peremptorily denied by the appellant. The rule does not admit such an exception; but even if it did, there is not any necessity for it here. There might be a delay, but there would not be a denial of justice, for in this proceeding in Chancery the law has provided a remedy. If it had not done so, one must be created.

\* 783 \* [LORD BROUGHAM. — What, by Act of Parliament?]

Yes, if necessary. Suppose a real action had been brought against all the Judges of the Court of Common Pleas, it would have been necessary to delay the suit until the law had provided a remedy, by providing other Judges to try it.

[LORD BROUGHAM. — In the case of Serjeant's Inn all the Judges had an interest. Nothing was done there.]

The objection was there waived. It has been contended that the application to the Lord Chancellor to enrol the decree was an admission of his jurisdiction. But that amounts to saying that because the Lord Chancellor is interested, the appellant is to have no redress whatever, for if he does not get the decree enrolled, he

<sup>1</sup> *Hardres*, 503.

cannot come here; and if he does get it enrolled, he thereby admits the jurisdiction against which he wishes to appeal. No such argument can be tolerated in this House. The enrolment is a mere ministerial act which the Lord Chancellor was bound to perform, which he may perform though he is interested in the suit, and the performance of which is no assertion of jurisdiction over the suit. It is not like hearing an appeal against the Vice-Chancellor's decree. The case of *Markwick v. The City of London*<sup>1</sup> is no authority for the other side, for there an alderman might preside, and the two sets of Judges who might form the Hustings Court had co-ordinate jurisdiction, and were not, like the Vice-Chancellor and the Lord Chancellor, subject the one to the other. The Vice-Chancellor is a subordinate Judge, whose decisions are liable to be altered or reversed by the Lord Chancellor; and that being so, the objection which attaches to the decision of the Lord Chancellor attaches also to that of the Vice-Chancellor; and their several decisions must be reversed.

\* THE LORD CHANCELLOR proposed the following questions \* 784  
for the consideration of the Judges: —

“A public company established for constructing a canal was incorporated, and bought some land for the purpose of making the canal; a person claiming adversely an interest in such land recovered the property by ejectment. The corporation then filed a bill against the claimant, and to have their title confirmed. The Lord Chancellor had an interest as a shareholder in the company to the amount of several thousand pounds, which was unknown to the defendant; and he (the Lord Chancellor) granted the injunction and the relief sought.

“Was this a case in which the order and decree of the Lord Chancellor were void on account of his interest, and of his having decided in his own cause?

“A public company established for constructing a canal was incorporated, and bought some land for the purpose of making a canal; a person claiming adversely an interest in such land recovered the property by ejectment. The corporation then filed a bill against the claimant, and to have their title confirmed.

“The Vice-Chancellor, whose authority is derived under 53 Geo. III. c. 24, granted an injunction, and the relief prayed;

<sup>1</sup> 2 Brown P. C. 409.

and the Lord Chancellor, who had an interest as a shareholder in the company to the amount of several thousand pounds, which was unknown to the defendant, upon an appeal by the defendant, affirmed the orders made by the Vice-Chancellor. The orders were then enrolled, some upon the application of the defendant, and others upon the application of the plaintiff, by the order of the Lord Chancellor.

1. "Were the orders of the Vice-Chancellor void on account of the interest of the Lord Chancellor?"

2. "Were the orders of the Lord Chancellor void on \*785 \*account of his interest, and of his having decided in his own cause?"

BARON PARKE. — In answer to the first question proposed by your Lordships, I have to state the unanimous opinion of the Judges, that, in the case suggested, the order or decree of the Lord Chancellor was not absolutely void, on account of his interest, but voidable only.

If this had been a proceeding in an inferior Court, one to which a prohibition might go from a Court in Westminster Hall, such a prohibition would be granted, pending the proceedings, upon an allegation that the presiding Judge of the Court was interested in the suit; whether a prohibition could go to the Court of Chancery, it is unnecessary to consider.

If no prohibition should be applied for, and in cases where it could not be granted, the proper mode of taking the objection to the interest of the Judge would be, in Courts of Common Law, by bringing a writ of error, for error in fact, and assigning that interest as cause of error.

The former course was stated to be proper in the case of *Brookes v. Earl of Rivers*,<sup>1</sup> it being suggested that the Earl of Derby, who was Chamberlain of Chester, had an interest in the suit; and the Court held that, where the Judge had an interest, neither he nor his deputy can determine a cause or sit in Court; and if he does, a prohibition lies.

The latter course was adopted in the case of *The Company of Mercers and Ironmongers of Chester v. Bowker*,<sup>2</sup> where it was assigned for error in fact, on the record of a judgment for the Company of Mercers in the Mayor's Court at Chester, that

<sup>1</sup> Hardres, 508.

<sup>2</sup> 1 Strange, 639.

after verdict, and before judgment, \* one of the Company \* 786 of Mercers became mayor; and for that reason the judgment was reversed in the Court of Quarter Sessions, and that judgment of reversal affirmed in the King's Bench.

In neither of these cases was the judgment held to be absolutely void. Till prohibition had been granted in one case, or judgment reversed in the other, we think that the proceedings were valid, and the persons acting under the authority of the Court would not be liable to be treated as trespassers.

The many cases in which the Court of King's Bench has interfered (and may have gone to a great length), where interested parties have acted as magistrates, and quashed the orders made by the Court of which they formed part, afford an analogy.

None of these orders is absolutely void; it would create great confusion and inconvenience if it was. The objection might be one of which the parties acting under these orders might be totally ignorant till the moment of the trial of an action of trespass for the act done;<sup>1</sup> but these orders may be quashed after being removed by *certiorari*, and the Court shall do complete justice in that respect.

We think that the order of the Chancellor is not void; but we are of opinion, that as he had such an interest which would have disqualified a witness under the old law, he was disqualified as a Judge; that it was a voidable order, and might be questioned and set aside by appeal or some application to the Court of Chancery, if a prohibition would not lie.

As to the second question, we are of opinion that the Vice-Chancellor, under 53 Geo. III. c. 24, is not the mere deputy of the Chancellor. We agree that the interest of the \* prin- \* 787 cipal affects the deputy, on the rule adopted in *City of London v. Wood*,<sup>2</sup> and *Brookes v. Earl of Rivers*;<sup>3</sup> but we think that the Vice-Chancellor is not a deputy, but has independent jurisdiction to make decrees, subject to the power of the Chancellor, to be reversed, discharged, or altered by the Chancellor.

We think this is to be deduced from the language of the statute. By the second section the Vice-Chancellor has full power to hear and determine all matters, causes, and things depending in the

<sup>1</sup> See, with relation to this point, the observations of the Lord Chancellor in the case of *Scadding v. Lorient*, ante, p. 447.

<sup>2</sup> 12 Mod. 669, 686 et seq.

<sup>3</sup> *Hardres*, 503.

Court of Chancery, and all decrees, orders, and acts of such Vice-Chancellor so made or done shall be deemed to be orders and acts of the Court of Chancery, and shall have force and validity, and be executed, subject, nevertheless, in every case, to be reversed, discharged, altered, or allowed; and no decree shall be enrolled until signed by the Lord Chancellor.

If the decrees or orders are not reversed by the Lord Chancellor, they, in our opinion, are obligatory, and are in no way affected by the disqualification of the Lord Chancellor.

But in order to appeal against them to the House of Lords, they must be enrolled; and enrolment cannot be made without the Lord Chancellor's signature.

In giving that signature the Chancellor has a discretion which he may exercise.

But he may be applied to for that purpose, and if he gives his signature, his interest affords no objection to its validity.

For this is a case of necessity, and where that occurs the objection of interest cannot prevail. Of this the case in the Year Book<sup>1</sup> is an instance, where it was held that it was no objection to the jurisdiction of the Common Pleas that an action was brought \*788 against all the Judges of the Common \*Pleas, in a case in doubt which could only be brought in that Court.

We therefore answer the second question by saying, that the orders of the Vice-Chancellor are neither void nor voidable on account of the interest of the Lord Chancellor.

That the orders of the Lord Chancellor are not void, but voidable, and his signature to the order for the purpose of the enrolment is neither void nor voidable.

THE LORD CHANCELLOR. — This is an appeal against a judgment of the late Lord Chancellor Cottenham, which judgment simply affirmed certain decrees previously made by the Vice-Chancellor. The effect of the opinion which your Lordships have just heard (though I do not propose to advise your Lordships now to decide the point) is, that the interest of the Lord Chancellor in the subject matter of the suit disqualified him from deciding upon it. In ordinary cases, an appeal to this House would be a proper proceeding to set aside the Lord Chancellor's decree. If the case in the Court below had stood simply on the judgment of the Lord

<sup>1</sup> Year Book, 8 Hen. VI 19; 2 Roll. Abr. 93.

Chancellor, your Lordships, if you adopted the opinions of the learned Judges, would have been called on to make an order which would reverse every thing that had been done in the Court below. But as the Vice-Chancellor here made a decree, which was merely affirmed by the Lord Chancellor, the removal of the Lord Chancellor's affirmance, according to the opinion we have just heard, would not affect that decree, and the reversal of the order of affirmance would simply leave the order of the Vice-Chancellor standing, as if the Lord Chancellor had never taken part in the proceedings of the Court below. Now, as the suitor has a right to come directly from the Vice-Chancellor to your Lordships' House, the appeal here \* would stand cor- \* 789 rectly before the House as an appeal, not only against the affirmance, — which may be considered, for the purpose of observation, as void; on account of the Lord Chancellor's interest, — but as an appeal on the merits against the decision of the Vice-Chancellor, and, as such, proper to be heard at your Lordships' bar.

I understand the opinion of the Judges to be, that the interest of the Lord Chancellor was such as disqualified him from judging in the cause; and I must therefore infer that, in their opinion, there was no such absolute necessity for his adjudication as, upon the ground set forth in some of the cases, might be deemed to render his decision effectual. As I entirely concur in the opinion of the learned Judges on the second point; namely, that the decision of the Vice-Chancellor cannot be affected by any interest existing in the Lord Chancellor, although the latter acted in the matter; and as I think that the reversal of his decree cannot affect that of the Vice-Chancellor, which may stand alone, I propose that, without at this moment affirming or disaffirming any part of the proceedings of the Court below, on the ground stated in the valuable opinion we have just received, your Lordships should proceed to hear the decree of the Vice-Chancellor discussed upon the merits on Monday next.<sup>1</sup>

LORD BROUGHAM. — I quite agree with my noble and learned friend, that it is unnecessary for us now to give an opinion on the matter of the Lord Chancellor's disqualification to hear this case. I have no hesitation in saying that my opinion is, upon the second

<sup>1</sup> See post p. 801.



point, very clear indeed, and it agrees with the opinion of  
 \* 790 the learned Judges. There is quite enough \* before the  
 House, not only to authorise us, but to call upon us to go  
 on with the case, and to hear it on the question of equity raised in  
 it.

Adjourned.

The argument on the Vice-Chancellor's decree was accordingly  
 heard, and at its conclusion, —

THE LORD CHANCELLOR said. — In reference to the question  
 upon which her Majesty's Judges, a few days since, gave their  
 opinion, at the desire of this House, the effect of that opinion, in  
 which I for one entirely concur, is, that having regard to the  
 interest which the late Lord Chancellor had in the Grand Junction  
 Canal Company, his decision must be deemed to be voidable,  
 and that an appeal to this House must be considered, as a pro-  
 ceeding in a Court of Equity, the proper step to be taken to avoid  
 such a decree. Adopting the opinion of the learned Judges in  
 that respect, it will be proper to declare that the orders and  
 decrees appealed against, so far as they were made by the late  
 Lord Chancellor, shall be reversed. Upon that, my noble and  
 learned friends and myself entirely agree.

Upon the other question, upon which I never entertained any  
 doubt, namely, whether the decrees and orders of the Vice-Chan-  
 cellor could be affected by the circumstance that the Lord Chan-  
 cellor who affirmed them had an interest in the subject matter of  
 the suit, the learned Judges have given the House a very clear  
 opinion, and in that opinion I entirely concur; it is that which I  
 always entertained. It is impossible to represent, upon the statut-  
 able authority given to the Vice-Chancellor, that he is in the situa-  
 tion of a mere deputy, so as to fall within the cases referred to,  
 or to say that therefore any order or decree made by him  
 \* 791 \* would be void or voidable, in case the Lord Chancellor  
 himself had an interest in the matter of the suit. There is  
 no warrant for such an opinion in the words of the statute, and I  
 cannot conceive any thing more mischievous or absurd than to  
 suppose that an order or decree made by one of the Vice-Chancel-  
 lors should be void in a case where the Lord Chancellor did not  
 interfere judicially, merely because the Lord Chancellor himself

had an interest in the subject of the suit. Lord Cottenham thought so differently upon that point, that he called in one of the Judges of the Court; that Judge, no doubt, possessing in some measure an original jurisdiction, but still an inferior Judge,—he called that Judge in to his assistance, to advise him upon the very point now being decided by your Lordships. I apprehend that these decrees of the Vice-Chancellor are good as far as they can be maintained consistently with the rules of equity; and if your Lordships should be of opinion that the case is not made out on the part of the appellant, as to the equity he asserts,—that is to say, that no relief ought to have been granted to the company as against him,—I apprehend you will feel no difficulty in affirming the orders and decrees of the Vice-Chancellor, and of declaring that they shall be held to be good, and unaffected by any thing which took place as to the affirmance of them or the dealing with them by the Lord Chancellor.<sup>1</sup>

LORD BROUGHAM.—There are two branches of this case to which my noble and learned friend has referred. One of them is that which arises upon the first argument of the appellant, upon which your Lordships have taken the opinion of the learned Judges; and it is immaterial, as to the result of this case, \* in which way we dispose of the first question put to the \*792 learned Judges, namely, whether or not the Lord Chancellor, in respect of his interest, was disqualified from acting as a Judge in the cause, and therefore whether his decree was voidable or void. That it was not void, my noble and learned friend on the woolsack, and my noble and learned friend Lord Cranworth, who is not now here, entertained, during the argument, a very strong opinion. The learned Judges consulted have come to a clear opinion upon that subject, that the decree is not void, but only voidable; nevertheless, that it is to be avoided when brought under review, and upon objection taken. But with respect to the second point submitted to them, whether or not the Vice-Chancellor's judgment is void, in respect of the Lord Chancellor's authority being null from the beginning of the whole proceedings in the Court of Chancery, I must say that I never from the beginning had the least doubt, and was therefore very little surprised to find

<sup>1</sup> His Lordship then proceeded to give his judgment on the case itself, see post p. 801.

the learned Judges declare that the Vice-Chancellor has an entirely independent jurisdiction, and is not in any respect dependent upon the Lord Chancellor, from whom he only receives directions as to what cases he shall entertain and dispose of. That by the Act is the only connection which subsists between the two branches of the Court of Chancery, with the exception of the final enrolment, which requires the previous signature of the Lord Chancellor; but, as plainly as an enactment can speak, the Vice-Chancellor has a substantive and an independent jurisdiction conferred upon him by the very words of the statute; and it is expressly stated in that statute that his decrees shall be decrees of the Court of Chancery, and shall have execution as such. And then follows the only connection established between his proceedings and those of the Lord Chancellor, that there shall be no enrolment \* 793 of a decree, with the view \* to further proceedings, without the previous signature of the Lord Chancellor; but the giving of that signature cannot affect the validity of the Vice-Chancellor's decree. Therefore, my Lords, we have now in the first place to declare, agreeing in opinion with the learned Judges, that the interest of the Lord Chancellor rendered his decree voidable, and to declare that that decree is reversed, and we have then to deal with the decree of the Vice-Chancellor.<sup>1</sup>

LORD CAMPBELL. — I take exactly the same view of this case as do my noble and learned friends, and I have very little to add to their observations. With respect to the point upon which the learned Judges were consulted, I must say that I entirely concur in the advice which they have given to your Lordships. No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last

<sup>1</sup> See post p. 808.

resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to \*avoid the appearance of labouring under such an influ- \*794  
ence. It is quite clear, likewise, I believe, that the orders of the Vice-Chancellor cannot be in the slightest degree affected by what the Lord Chancellor has done, nor can it be maintained that the Vice-Chancellor was acting merely as the Lord Chancellor's deputy when these orders and decrees were pronounced.<sup>1</sup>

## DIMES v. GRAND JUNCTION CANAL.

1852. June 29.

WILLIAM DIMES,	.	.	.	.	.	.	<i>Appellant.</i>
The PROPRIETORS of the GRAND JUNCTION CANAL,	}						<i>Respondents.</i>
T. E. SKIDMORE, and others,							

*Canal Act. Copyhold. Statutory Conveyance. Trustee.*

An Act of Parliament incorporated certain persons as a company for the purpose of making a canal, and gave them powers to purchase and hold lands for the purposes of the Act; it authorised persons to "contract for, sell, and convey their lands," gave a form of conveyance "of all the estate, right, title, and interest" of the person conveying, and enacted that all such contracts, agreements, sales, conveyances, and assurances should be valid to all intents, &c. S. was a tenant of copyhold land, a portion of which was wanted for the purposes of the canal; he sold it to the company, and executed a conveyance according to the form given by the Act. The land was then applied to the purposes of the canal. On the death of S. the lord made a proclamation for the heir of S. to come in and be admitted as a tenant on the rolls of the manor. No one appeared to claim admittance, and the lord seized the land *quosque*. He afterwards brought ejectment against the canal proprietors, and obtained judgment against them on the ground that the conveyance under the Canal Act had only vested in them an equitable estate in the copyhold land. He then interfered to stop the course of the navigation. The canal proprietors filed a bill against him, praying that the customary heir of S., or such other person as the plaintiffs might appoint, might be admitted to the copyhold

<sup>1</sup> Post p. 809, and see the next case.

premises, the plaintiffs undertaking to pay the fine and fees upon such admission; and further praying \* for a perpetual injunction and general relief. The Vice-Chancellor made a decree directing that the customary heir of S. (who had been made a party to the suit) should be admitted tenant to the copyhold premises in question, and when admitted should hold the same as trustee for the plaintiffs in the suit, and the amount of the fine was referred to the Master, and an injunction was granted as prayed: —  
*Held*, that the decree of the Vice-Chancellor was right.

*The Solicitor-General and Mr. Selwyn.*<sup>1</sup> — This is not a question of equitable right, for there is no pretence for a Court of Equity conferring on these respondents the power of doing, without conditions, that which the legislature has withheld from them, except upon conditions. This case must be considered with reference to the provisions in the Canal Act as to the purchase of land.<sup>2</sup>

<sup>1</sup> See the statement of facts, ante p. 759.

<sup>2</sup> The Act in question was the 33 Geo. III. c. 80, which incorporated "The Company of Proprietors of the Grand Junction Canal." The following are all its provisions in any way relating to this case. It directed that "the said company should have power and authority to purchase and hold lands to them, their successors, and assigns, for the use of the said navigation, without incurring the penalties or forfeitures of the Statutes of Mortmain." And the proprietors were authorised to make a canal, &c., &c. for the purposes aforesaid, to enter upon the lands and grounds of any person, and to set out such parts as were necessary for making the canal, &c., they making satisfaction in the manner therein mentioned to the owners or proprietors of, and all persons interested in, the lands, &c., for all damages sustained in consequence of the execution of the Act. By the 9th clause, all classes of persons were authorised to "contract for, sell, or convey" their lands "unto the said company of proprietors." The clause went on to declare that "all such contracts, agreements, sales, conveyances, and assurances should be valid and effectual to all intents and purposes whatsoever, any law, statute, usage, or custom to the contrary thereof in any wise notwithstanding." — Section 30.

Section 30 provided that the commissioners shall and may settle "what shares and proportions of the purchase money or compensation for damages which shall be so agreed for and determined, and adjusted, or assessed in manner respectively as aforesaid, shall be allowed to any tenant or other person or persons having a particular estate, term, or interest in the premises, for his, her, or their respective interest therein, and with due regard to the rights and interest of the lord or lords, lady or ladies, of any manor or manors whereof the lands or hereditaments to be affected by the said canal are respectively holden."

Section 101 enacted that nothing in the various Acts "shall prejudice the right of any lord, &c. of any manor, or of any owner, &c. of any land through which the canal, &c. shall pass to the mines and minerals under such lands"; and reserves them to such lord.

Section 103 empowers the company to make any navigable branch from the

\* Before converting this land to the purposes of a canal, the respondents were bound to make compensation to the lord of the manor, in respect of his rights as such lord. \* 796

He had obtained a judgment in ejectment, and till he was disturbed by this decree he was in lawful possession of the land. The decree has now, in the face of that judgment, and in derogation of his rights as lord of the manor, handed over the possession of the land to the respondents. Yet the rights of a lord of the manor are expressly made the subject of legislative protection in the 30th, the 101st and 103d sections of the Act.

Wherever an Act of Parliament incorporates a number of persons to carry on an undertaking, and confers on \* them powers and authorities for that purpose, those powers and authorities must be exercised exactly as the law has pointed out. *The Glamorganshire Canal Company v. Blake-more*.<sup>1</sup> Here the Act has conferred these powers, on the condition that the rights of the owners of land shall be fully compensated by the canal proprietors, "they making satisfaction to the owners," &c. That condition has not been complied with in the present case. The rights of the copyhold tenant have been purchased, but not those of the lord of the manor. Under such circumstances, the respondents can have no equities as against him. The Canal Acts only gave the power to take lands for a particular purpose, and without a power so conferred, the company would have been prevented, by the Statutes of Mortmain, from taking the lands at all. It is only, therefore, where the respondents strictly pursue the provisions of the Act that they can either hold or retain lands. \* 797

The legislature never contemplated the case of a person purchasing a copyhold interest from a tenant only, but making no satisfaction to the lord, and yet taking the lord's land. The company, or some one representing the company, after purchasing Skidmore's interest, ought to have been admitted tenant; for the interest of the lord, and his right to have a tenant of the land,

canal, &c., "through or over any common or waste lands, with the consent, under the hands and seals of the lord or lady of the manor, and also in, over, or through any other lands or grounds, with such consent of the owners thereof"; such branch, when made, to be deemed part of the canal for every purpose of the Act. Power is also given to any lord or lady of a manor, or to any owner, &c., with such consent as aforesaid, and under other conditions, to make navigable communications at "his, her, and their own expense," &c.

<sup>1</sup> 1 Clark & Finnelly, 262. See also 1 Mylne & Keen, 154.

never ceased. Having acquired the interest of the copyhold tenant, the respondents were bound to take a further proceeding, and put themselves into his situation as regarded the lord.

[THE LORD CHANCELLOR. — Does not the conveyance under the Act transfer all the right, title, and interest of Skidmore ?]

Yes ; but Skidmore was under liability, as a copyhold tenant, to the lord.

\* 798 \* [LORD BROUGHAM. — Then you say that the company is now Skidmore, but Skidmore unadmitted ?]

Exactly so. The 10th section says that every body politic, &c. thereinbefore capacitated to sell or convey lands, or any owner of lands through which the canal or cuts should be made, might receive satisfaction for the value of the lands, and the damages to be sustained ; and the canal proprietors, after the execution of the sale and conveyance, might enter upon, and thenceforth for ever enjoy, the said lands and yearly rents, as might be agreed upon and settled. All these provisions show that more than the mere interest of a tenant was contemplated. The 25th section justifies the same view. It speaks of an “ annual rent,” and “ a recompense for the yearly produce or profits ” ; upon payment of which, or on legal tender of the same, the canal proprietors are to have the right to enter on the lands ; and there is a proviso expressly declaring that before such payment or legal tender, it shall not be lawful for such proprietors to enter on the lands. That section completely negatives any claim derived by the respondents from their dealings with Skidmore for his interest ; they were bound to make satisfaction to the appellant.

[THE LORD CHANCELLOR. — When did any copyhold interest vest in this corporation, and when was it divested ? You admit the conveyance as transferring Skidmore’s interest.]

The interest of Skidmore may be admitted to be in the respondents ; but that is not enough to justify them in entering on the lands. The clauses of the Act already quoted show that they must, in addition, purchase the rights of the lord. Yet they have been allowed to file a bill against the appellant, and he has been restrained by injunction from enforcing the right which he successfully asserted at law.

[THE LORD CHANCELLOR. — You thought proper to seize

\* 799 \* *quousque* as for want of a tenant. You said that there was no tenant to the premises, and therefore you had a

right to enter. Now you say that the respondents are the tenants ; that they have title as copyhold tenants by the execution of the conveyance. In that way you admit that they had a legal title at the time you brought ejectment, yet you seized *quousque*, as if there was no tenant. But if the respondents, as a company, had a legal title, they have that title now ; for an incorporated company never dies.]

The argument here does not affect to deal with the legal title, but with the right of the respondents to dig the land without compensating the lord. Besides, if the respondents really had the legal title by the conveyance, they ought to have come in upon proclamation. The appellant had a right to assume that there was no tenant, when, upon proclamation duly made, no tenant came in. All that Skidmore had of course passed to the respondents ; but that they acquired a right, by their transaction with him alone, thus to deal with the land, is a totally different matter. The company can only take lands in pursuance of the provisions of the Act.

[THE LORD CHANCELLOR. — You admit that the company has obtained the interest of the copyhold tenant: the decree against which you appeal deals only with the copyhold interest.]

Not quite so. The appellant is aggrieved in this way: First, he was in actual possession of the land ; that land has been taken from him, and put into the possession of the respondents by a perpetual injunction. He is then called on to admit the heir of Skidmore, according to the custom of the manor. He finds that the land has been converted by the respondents to purposes which, if it had been so applied by an ordinary tenant of the manor, would have \*been the ground of a forfeiture. He \* 800 says that there is nothing in this Act of Parliament which authorises the respondents to hold lands as tenants of a copyhold manor. They have no right to have Skidmore act as trustee for them, enabling them to deal in his name with the land, when, in fact, their claim is, that all his interest has passed out of him. Yet the effect of this injunction is to put the respondents into possession in his name, but so that in their own names they may deal with the land as if it was their own freehold. Equity will not allow that to be done. The purchase from Skidmore, except for the purposes of the Act, was null, and gave the respondents no right to convert the land into a canal until they had satisfied the



interest of the lord. They might have called on him to convey to them his interest under the Act of Parliament. That conveyance alone would have given them a complete title to use the land for the purposes of the canal.

Then, as to the right of the respondents to maintain this suit. There is not by this Act any power given to the respondents to hold the land as *cestuis que trust* of Skidmore, the tenant of the manor. He merely parted with his equitable interest to them; he continued the legal tenant, and the interest of the lord was not purchased at all. The whole interest must be purchased before they can exercise any powers under the Act. But here, that of the tenant alone was purchased. No demand was made on the lord to admit the respondents; and without doing so, there was no pretence to ask for the interference of a Court of Equity; and certainly, equity can have no jurisdiction to require the lord to admit the heir of the last tenant to hold as trustee for the respondents, who claim to treat the lands as if holding them in fee simple for the purposes of an Act, the provisions of which they have entirely disregarded.

\* 801     \* *Mr. Stuart* and *Mr. Bethell*, for the respondents, were stopped.

THE LORD CHANCELLOR.<sup>1</sup> — It is not necessary, my Lords, to hear the respondents' counsel in this case. It does not present any real difficulties, as the facts are now understood.

This case stood over to be argued upon the merits; namely, upon the injury done to the appellant by the respondents taking his land. The case itself is a very simple one. A small piece of land, about two acres, was wanted for the purposes of the Grand Junction Canal; it turned out to be copyhold. The appellant, at a subsequent period, became the purchaser of the manor of which this land formed part, and therefore became the lord of that particular copyhold tenement. The respondents, under the powers in their Act, bought the land of Mr. Skidmore, the copyhold tenant. It admits of no doubt that the Act enabled them to make that purchase, nor is it disputed that the land could be so purchased. The different sections of the Act, the 30th and the 101st especially, show clearly that copyhold interest might be pur-

<sup>1</sup> See ante p. 790.

chased under the Act. The property having been purchased by the Company, the then lord of the manor neither attempted to take advantage of any supposed forfeiture, nor to disturb the company in the possession of the land. It is a different question whether a subsequent lord could take advantage of it after that waiver. The respondents had, by their Act, a right to cut through the land, and to apply it to form the canal; and whatever rights they may have must depend upon the Act of Parliament,—so far, at least, as regards the things done,—for they can only be justified if they were done under the Act. But, unfortunately, the

\* Act of Parliament, being an early one upon this subject, \* 802 did not provide properly for the interest of the lord, as distinguished from the interest of the tenant; upon which all the difficulty has turned. We must deal with the case as we find it upon the Act of Parliament. In consequence of the purchase, a conveyance was executed by the tenant, in the form prescribed by the Act of Parliament; that form, of course, was not adapted to a copyhold, for instead of being a surrender in a common ordinary form, it was a conveyance, in a few short words, of “all estate, right, title, and interest, of the person conveying”; and the main question here has turned upon the effect of that conveyance. After that conveyance, no step was taken by the then lord of the manor, who lived for some years afterwards. Mr. Dimes then became lord of the manor. Upon the death of Mr. Skidmore, Mr. Dimes, as lord of the manor, called by proclamation for some person to come in to be admitted tenant, stating expressly in the proclamation he issued, and which he had a right to issue, that the tenant was to come in and be admitted to the estate “of which Joseph Skidmore, one of the customary tenants of the said manor, lately died seised.” My Lords, that is an assertion that this Joseph Skidmore had died seised of that estate, and that could only be on the construction that the legal estate in the copyhold had not passed by the conveyance in question, and that the copyhold inheritance still remained in Skidmore, and descended to his customary heir. No one came in to be admitted. In the result,—for I have stated what I consider to be the operation of that conveyance,—Mr. Dimes seized *quousque*; he seized *quousque*, because of the want of a tenant upon the death, as he alleged, of Skidmore, and he then proceeded to recover the estate at law. After a considerable discussion, the Courts differing, it was held that he

\* 803 was entitled—to do what? To seize *quousque*. \* How could he justify that mode of proceeding? He did seize, upon his own allegation, as one ground of title so to proceed, that Skidmore had died seised of the copyhold property; else his title would have been a totally different one. He should have put it on a different ground. The mesne profits were recovered; but afterwards a bill was filed by the respondents, and upon that bill the Vice-Chancellor of England made orders granting interim injunctions, and ultimately made decrees granting a perpetual injunction; his opinion being, that the copyhold estate did not pass at law by the conveyance in question, and he declared that Skidmore was a trustee for the company, and that the heir of Skidmore was entitled to be admitted; and he decreed Dimes to admit that heir, and that the heir should be deemed a trustee for the company. What mischief did that do to Mr. Dimes? He remains the lord of the manor, having the same rights as such over this piece of ground, through which this canal had been cut, as he had before, and being entitled to all the fruits, all the quit-rents, and all the fines, and entitled to have a tenant always on the roll. In short, his rights are in no manner cut down by the effect of that declaration.

What was the real operation of this conveyance? It is quite clear that the Act of Parliament did not contemplate the exact case, and it is very difficult to say that a conveyance could pass a copyhold estate without a surrender, and without an admittance nobody would appear upon the face of the roll as tenant. But there is no objection to the way in which the Vice-Chancellor deemed it to operate. The Act intended to give, and did give, to the copyhold tenant power to sell his fee, and it gave the company power to buy it, and appropriate it for these works. Then how did the matter stand? Suppose the conveyance to be incompetent to pass the copyhold estate as a copyhold estate, \* that is to say, to operate as a surrender, and perhaps as an admittance, which would be a very strong operation to give to it; then, by the clearest and plainest rule of equity, which has never been departed from, Skidmore having sold to the canal proprietors, and having by an imperfect conveyance conveyed to them his copyhold estate, became in equity a trustee for them, and the Court would compel him to deal with his legal estate, if it did remain in him, simply as trustee for them. And upon that ground the Vice-

Chancellor acted. Now, my Lords, the case has assumed a very singular shape, for the appellant's own title to recover at law being founded upon the seizure *quousque*, in consequence of Skidmore having died seised of this copyhold, and the appellant having recovered upon that title, he turns round, as sometimes it has been said, "upon himself," and actually maintains that the conveyance, made under the form given in the Act, conveyed the whole copyhold interest to the respondents, and that they took that copyhold interest without an admittance. If they did, they became copyhold tenants. Then what becomes of the title of the lord? He could not insist, having seized *quousque*, upon coming in under a new title; and certainly never could rely upon that new title as against the company, if the effect of the conveyance was to vest the copyhold estate, as a copyhold estate, absolutely in the respondents, without admittance. He was not bound, I agree, to admit a corporation; but, upon the facts I have now stated, what becomes of the supposed injury to the legal title of the lord? He has still got his freehold, — he is lord of the manor; but he has got, according to the very arguments at the bar, the copyhold interest and the copyhold tenant, — a corporation which will remain for all time a copyhold tenant, without requiring any admittance.

That which the appellant now insists on, my Lords, is  
 \* indeed a new view of the case, and it is a view which I \* 805  
 must advise your Lordships he cannot be allowed to take.

You cannot allow a party to turn round and assert a title in direct opposition to the title upon which he has recovered the property, and upon which every thing has been depending throughout this long and painful litigation. It is impossible that you can allow a party to turn round and to say that the title upon which he recovered was naught, that he discards that title, and insists upon one of a totally different kind, depending upon a construction of the Act of Parliament entirely different from that which he originally asserted.

It is said, independently of that, not denying on the part of the appellant that the company could buy, and that the tenant could sell, — it is said that something else must be done. It is insisted that the company must buy the freehold, and add that to the copyhold interest; but it is properly asked, where is that direction in the Act of Parliament? The direction of the Act no doubt is, that the purchaser shall hold it, and hold it for ever. Here the

tenant, the company, will hold it for ever ; therefore the words of the Act of Parliament are perfectly satisfied, and the interest of the lord is secured. He has an interest totally distinct from the interest of the tenant. Each has a right, and may sell the right ; and it would have been well if the Act had provided more carefully for these different interests ; but it is utterly impossible to contend that the purchase of a copyhold interest, being of itself, independently of any thing else, a perfect purchase, can be affected by the fact that there has been no purchase of the freehold interest. I listened with some curiosity to learn what was the time within which this purchase of the freehold must be made, and what was the interest of the different parties during the interval

\* 806 of suspense ; but the \* learned counsel, not for want of ability or ingenuity, but because the case rendered it impossible that he should do so, never pretended to offer to *your Lordships* any explanation. When is the time to end during which the purchase may be made ? Has it ended now ? May not the purchase take place to-morrow ? The Act points out no such limit of time. The first purchase is perfectly good ; during what period are you to wait before the rights incident to it may be put into operation ? And as regards the interest in the mean time, is the interest devested ? Where is it ? It cannot be in the lord. The learned counsel for the appellant is in this difficulty, that whilst he contends that the two interests must unite in order to bring the case within the Act of Parliament, he totally loses sight of his own interest. Where does he get any under this Act of Parliament other than that which he had before as lord ? Where can he find in the Act any clause giving him an interest greater than he had before ? Then as regards what he had before as the lord, is he entitled to damages or compensation for an act done on the copyhold property ? That is a distinct question, and he must try his right upon that question. I do not advise him to do so ; it is a distinct question, and if he asserts any right of that kind, it must be in a different Court, and by a different mode of proceeding.

The question, then, comes to this. There is no sufficient foundation for the argument which has been maintained at *your Lordships' bar*, that the respondents did take the legal estate in the copyhold ; but if they did, I think that tells more against the appellant than against the respondents. I think, considering the

ambiguity of the Act, and it has not provided as it ought to have done for the interest of the lord, that the Court below has hit upon the true construction to be given to this conveyance, and that its perfect operation is \* an equitable conveyance, \* 807 conveying all the equitable right, and leaving the legal interest in the lord and in the tenant unaffected. That construction meets the justice of the case: it leaves the rights of the copyholder altogether untouched. The equity of the case admits of no doubt. Skidmore being, as I have stated to your Lordships, by the clear rule of equity, a mere trustee for the respondents, he held during his life as trustee for them, and they never were disturbed. Your Lordships will observe that it was not till the death of Skidmore that anybody asserted a right on the part of the lord of the manor over this property; when his heir, who, at the time of the death was under disability, became entitled, that heir immediately became trustee for the respondents; when they filed a bill against the lord, who had recovered the property upon a seizure *quousque* (which everybody knows does not operate beyond the time that the person entitled comes in to be admitted), Mr. Dimes still insisting upon his legal right, the Court declared that he should be bound, as he ought to be, to admit Mr. Skidmore's representative as a trustee for the respondents, and thus to clothe them, in that respect, not with a legal title, for they would not be legal tenants, but with all the equitable rights which they really purchased, and for which they paid. This inflicts no hardship whatever upon Mr. Dimes, he has all the interest he ever had; no more and no less.

My Lords, one difficulty has been raised in this case by the original contention of the respondents. They had, I dare say, supposed that the purchase from the tenant would be a purchase of the rights of the lord, and that the purchase money would be apportioned between them. I know not how that was; but the original contention of the company was, indeed, very different from that which it is at the period at which we have now arrived, for the respondents \* insisted that the conveyance \* 808 by the tenant was a conveyance of the whole freehold, and that it divested the lord of the manor of his freehold. The learned Judges in the Queen's Bench and in the Exchequer Chamber, the learned Vice-Chancellor and the Lord Chancellor, in fact the Judges in every Court before which this case has come, have

all decided that that was not the true operation of the conveyance, but that its operation was to leave the Lord with all his rights unaffected, whilst it gave to the respondents the interest which the copyhold tenant possessed.

My Lords, a question has been raised as to the costs. I can see no sufficient ground to advise your Lordships to touch the question of costs. With regard to the decrees of the Vice-Chancellor, the only remaining point is, that it is referred to the Master to compute or settle the amount of fine to be paid on admission. It is said that that ought to go to a jury. I think, as the Court was dealing with the case, it was quite within its competency to deal with that question also, as part of the general relief sought. But if in any future stage of the case it should appear that there really was a question which ought to go to a jury, the Court would have no difficulty in that subsequent stage in sending it to a jury, if necessary, to ascertain what ought to be the amount of the fine. I do not consider, therefore, that the parties are precluded, if the Court should authorise it, from still having recourse to a jury if they want it, in order to ascertain the amount of fine to be paid upon the admission of a trustee. I therefore advise your Lordships to affirm the orders and decrees of the Vice-Chancellor, which, as we have already decided, remain unaffected by the orders and decrees of the Lord Chancellor.

LORD BROUGHAM, after referring to the question relating to the competency of Lord Chancellor Cottenham to sit as a  
 \* 809 \* Judge in the cause, and to the effect of his signing the enrolment of the Vice-Chancellor's decree,<sup>1</sup> said: Your Lordships have then to deal with the decree of the Vice-Chancellor which remains, and which has now been the subject matter of argument at your bar.

I concur in the opinion of my noble and learned friend, and in the opinion of the Court below, that the decree of the Vice-Chancellor must be affirmed. I am quite aware that there is a difficulty in it. I am quite aware that there is a defect in the Act, and that that defect must have given rise, and no doubt did give rise, to some contention, and was a subject of some difficulty and doubt even in the Court below. But I do not find any sufficient reason for differing from the Court below in the manner in which the

<sup>1</sup> See ante p. 791.

Vice-Chancellor has extricated the question from that difficulty and has disposed of the cause.

LORD CAMPBELL<sup>1</sup> having expressed his opinion on the objections with relation to Lord Chancellor Cottenham adjudicating in the cause, and signing the enrolment of the decree, said : —

We then come to consider on the merits the decree now appealed against. I have not been able to entertain any doubt respecting its propriety. This decree deals only with the copyhold tenement ; and it lies upon the present appellant, Mr. Dimes, to show that he is prejudiced by it. Now in no point of view can it be shown that he is prejudiced by it. If, as it has been argued, the whole of the interest in the copyhold tenement passed absolutely to the respondents, this decree would not in the slightest degree prejudice the lord, because it would give him a fine, and it would give him advantages, which he would not otherwise be entitled to. But that I apprehend is clearly not the only

\* view which you are bound to take of it. And when your \* 810 Lordships look at the Act, and what was done under it, you cannot consider that the legal interest in the copyhold tenement did pass from the copyhold tenant to the respondents, because it never could be the intention of the Act of Parliament that a grantor should have the power to part with a greater interest than he himself possessed, and the copyhold tenant could do nothing which in the slightest degree could prejudice the rights of the lord. Therefore the view that was taken by Mr. Dimes, when he became lord of the manor, was a just view, that he had a right to have a tenant to the tenement ; and, acting upon that view, he seized *quousque*. He then brought an ejectment, and he recovered the mesne profits. But, having done so, he cannot, in the subsequent stages of the proceedings, when he has driven the canal proprietors to proceed against him for an injunction and a decree for the admittance of the heir of the copyhold tenant, be allowed to say that the whole interest passed from Joseph Skidmore, the tenant, to the respondents, and that he is not compelled to admit a mere stranger. For in effect he now contends that young Skidmore is a mere stranger, and has no interest nor any claim to be put upon the copyhold roll. This double sort of contention cannot be allowed. The appellant made a proclamation

<sup>1</sup> See ante p. 793.



for the heir of Joseph Skidmore ; it is proved that Thomas Emmott Skidmore is the heir of Joseph Skidmore, and in fact the appellant called, by his proclamation, upon Thomas Emmott Skidmore to come in and be admitted. After that, how can he be allowed to say that that person is a mere stranger ? T. E. Skidmore is the heir of Joseph Skidmore, in whom I think the legal estate, so far as the lord is concerned, was rightly considered to have remained, and therefore Joseph Skidmore must be considered as having died seized, and the other, being his heir, ought to be admitted.

\* 811 \* The decree then, properly regarding the rights of the lord of the manor, and following the rule of equity applicable to a transaction of this kind, directs that young Skidmore shall be admitted, but shall be admitted as trustee for the respondents, to whom Joseph Skidmore had, in fact, parted with his interest.

Ordered and adjudged, that the orders and decrees of the Lord Chancellor be reversed, without prejudice to the orders and decrees of the Vice-Chancellor ; that the orders and decrees of the Vice-Chancellor appealed against be affirmed, and declared to be unaffected by the orders and decrees of the Lord Chancellor, and that the appeal be dismissed.

Lords' Journals, 29th June, 1852.

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\* 812 \* ELLWELL v. BIRMINGHAM CANAL NAVIGATION.

1852. June 24, 25, 26.

EDWARD ELLWELL,	.	.	.	.	.	<i>Plaintiff in error.</i>
The PROPRIETORS of the BIRMINGHAM CANAL	}	.	.	.	.	<i>Defendants in error.</i>
NAVIGATION,						

*Canal. Waste Water.*

A canal, formed under a private Act of Parliament, had three levels, of which A was the highest, B the middle, and C the lowest level. The canal proprietors (though without authority under their Act to do so) erected engines between the C level and the plaintiff's mill-forge, and pumped back the water, which, after serving the purposes of navigation in levels A and B, had flowed into level C. In 1826, a new Act, repealing former Acts, and re-enacting their

provisions, with certain alterations and additions, was passed. The 15th section gave the canal proprietors authority to maintain engines, &c. for supplying the canal with water, and for that purpose to have reservoirs and feeders supplied from all brooks, streams, &c. from which they were lawfully supplied before the passing of the Act, and "from time to time to raise the water of the canals from one level to another, or to any reservoirs; and for any of the purposes aforesaid to use such engines as they should judge proper, making full satisfaction for all damages to be sustained by the owners of any mills, forges, brooks, streams, &c. taken, used, removed, diverted, or injured" in execution of the powers of the Act. By the 80th section, the canal proprietors were forbidden to take for the use of the canal any water out of the river above the plaintiff's forge, and they were directed to maintain flood-weirs, so that all waste water running into level C, not required for the purposes of the canal, should flow into the river above the plaintiff's forge. The proprietors pumped up as before the water out of the level C back into the level A; in consequence of which, except on extraordinary occasions, no water escaped over the weirs into the river:—

*Held*, that they were entitled to do so, and that such pumping back of the water from one level of the canal to the other did not give the plaintiff a right to compensation under the Act.<sup>1</sup>

THIS was a writ of error on a judgment of the Court of Exchequer Chamber, which had affirmed a previous judgment.\* of the Court of Queen's Bench. Mr. Ellwell was \* 813 the proprietor and occupier of a mill-forge and works called Ellwell's Forge, situated in the parish of Wednesbury, in the county of Stafford. The action was brought for a false return to a writ of mandamus issued in Easter Term, 1839. The declaration alleged that, under the 5 Wm. IV. c. 34 (an Act which repealed the previous Birmingham Canal Acts, and consolidated their provisions), the defendants had erected certain works which abstracted the water from the plaintiff's mill, and that the defendants were bound to summon a jury, according to the provisions contained in that Act, in order to assess the amount of damages thereby sustained; that a mandamus was issued to the defendants to summon a jury, but that they refused to obey the writ, and falsely returned that the plaintiff, by reason of the erecting of the engines and works of the defendants, did not and would not sustain any damage in respect whereof the defendants ought to make any compensation to him under the Act. The declaration then

<sup>1</sup> See Proprietors of Staffordshire and Worcestershire Canal Navigation v. Proprietors of Birmingham Canal Navigation, Law Rep. 1 H. L. 254, 261; Delamere v. The Queen, Law Rep. 2 H. L. 419.

averred that the plaintiff had sustained and would sustain damage, &c. The defendants pleaded, first, not guilty, and secondly, that the plaintiff had not sustained and would not sustain damage in respect whereof the defendants ought to make compensation to him according to the provisions of the said Act. The cause was referred to arbitration, and the arbitrator stated a special case for the opinion of the Court, which case was finally turned into a special verdict. The following were the material facts thus stated : —

The canals constituting the “ Birmingham Canal Navigations ” were formed at different levels, the highest of which was called “ the Wolverhampton Level,” the middle one “ the Birmingham Level,” and the lowest “ the Walsall Level,” all passing across the valley of the Tame above Ellwell’s Forge, and between the \* 814 forge and the principal \* source whence the water of the Tame was supplied. The Wolverhampton, or highest level, was the most remote from, and the Walsall, or lowest level, the nearest to Ellwell’s Forge. The three levels were connected by a series of locks, through which boats were constantly passing ; in consequence of which large quantities of water flowed from time to time from the upper and middle into the lower level. Upon the bank of the Walsall Level certain flood-weirs were made, in pursuance of the powers contained in the 5 Wm. IV. c. 34, § 86 ; a large portion of the water flowing from the upper and middle levels would, if not otherwise diverted, have flowed over the weirs into the Tame above Ellwell’s Forge, and would thus have increased the water-power of his mill. Connected with the lower level, at a place called Ocker Hill, were four steam-engines, used by the defendants in pumping water out of the lower, back into the upper level, for the purpose of supplying to, or retaining in, the levels a sufficient quantity of water to render them navigable. By these means the water, which, on the passing of boats, flowed into the lower level, was pumped back again into the upper level, and in consequence thereof the water in the lower level, except in occasional floods, was generally prevented from flowing over the weirs and running into the Tame above Ellwell’s Forge ; and this was the damage of which he complained.

The first Act under which the works were begun was the 8 Geo. III. c. 38, which was continued by subsequent Acts till the 5 Wm. IV. c. 34, when they were all repealed, and most of their pro-

visions re-enacted. The special verdict found that the steam-engines had been constantly used by the defendants for the same purpose, and with the same effect, from the times of their respective erection in 1784, 1791, 1802, and 1826, and there never had been any other sufficient means by which the upper and middle levels could \* be kept in a state fit for navigation. \* 815 The special verdict then set out the sections of the 5 Wm.

IV. c. 34,<sup>1</sup> the notices of claims for compensation given by the

<sup>1</sup> By the 15th section, the defendants were empowered to maintain the canals, together with (amongst other things) all engines and other works, whether temporary or permanent, as the defendants should think expedient for maintaining, using, repairing, improving, and supporting such several canals, and the appurtenances belonging thereto, and for the full use and enjoyment thereof, and for supplying the same with water; and that it should be lawful for the defendants to supply the said canals, and the reservoirs and feeders thereto belonging, with water from all and every the brooks, streams, waters, and watercourses from which the said canals, reservoirs, and feeders, or any of them, were, immediately before the passing of the said last-mentioned Act, lawfully supplied, and from time to time to raise the water of the said canals from one level to another, or to any reservoirs; and that for any of the purposes aforesaid, it should be lawful for the defendants to use such engines or other machinery as they should from time to time judge proper, making full satisfaction, in manner thereafter mentioned, for all damages to be sustained by the owners or occupiers, or other persons interested in (amongst other things) any mills, forges, watercourses, brooks, streams, or rivers respectively, which should be taken, used, removed, diverted, or injured, in or by the execution of all or any of the powers thereby granted.

By the 86th section it was enacted, that it should not be lawful for the defendants, or any other person whomsoever, on any account or pretence whatsoever, to divert or take for the use or supply of the said canals, or for any other purpose whatsoever, any water from or out of the said river Tame above a certain forge called Wednesbury Forge,<sup>2</sup> or from or out of any other brook, stream, rivulet, watercourse, or spring whatsoever running into or communicating with the said river Tame; but that the defendants should, at their own cost, make and support good and sufficient culverts and aqueducts to convey the same under the said canal in the several and respective courses in which they were accustomed to run, and that the defendants were thereby required, at their own costs and charges, at all times thereafter, to support and maintain certain flood-weirs, of a certain height and width, and upon certain parts of the said canals therein specified, so that all the waste and superfluous water arising from or running into that part of the said canals hereinbefore described as the Walsall Level, not required for the purposes of the said Act, should be turned and conveyed into the said river Tame in certain courses and directions therein specified, at points therein also specified, which are higher up the stream than the plaintiff's said mill, forge, and works.

<sup>2</sup> Which was situated above the plaintiff's forge.

\* 816 plaintiff under \* the Act, enumerated the different sources from which the canal had been supplied, described how the water which had been used in the upper and middle levels, and which then passed into the lower level, was pumped back again, so that it could not flow over the weir into the Tame and supply the plaintiff's forge, and stated the questions for the consideration of the Court to be, first, whether the defendants were guilty; and secondly, whether the plaintiff, by reason of the erecting, making, or using by the defendants of the said water-engines and other works, had sustained, did sustain, and would sustain, injury or damage in his forge, &c., in respect whereof the defendants ought to make compensation or satisfaction to the plaintiff according to the Act. If the plaintiff should be held entitled to recover, the damages were to be assessed by the arbitrator. Judgment was entered up for the defendants in the Court of Queen's Bench, and, on writ of error brought, that judgment was, on the 5th of February, 1850, affirmed in the Court of Exchequer Chamber, on the ground that the 86th section only gave the plaintiff a right to the waste and superfluous water running into the Walsall Level, and not required for the purposes of the Act, and that the water pumped back from that level into the other levels, being necessary to keep the canal in a state fit for navigation, the plaintiff

\* 817 had no \* right to the water so pumped back. The present writ of error was brought on that judgment.

*The Solicitor-General* and *Mr. George Denman*, for the plaintiff in error. — There is a good ground of action in this case. The surface waters of the neighbourhood contribute to the supply of the plaintiff's mill and forge. To these the plaintiff was clearly entitled before the passing of the last Act. Before the 5. Wm. IV. c. 34, there was no power to divert or lessen the waters which might pass over the weirs, and go to the plaintiff's mill. Whenever those waters descended into the lower level, the defendants' right to use them was exhausted, and they became waste water, to which the plaintiff was entitled. Then came that Act, which repealed all those of a previous date, and for the first time enacted that the defendants should have the power to pump up the waters which had descended into the lowest level, for the supply of the middle and upper levels. But that power was granted on the condition that compensation should be made to those whom the exercise of

it might prejudice. On that point, the plaintiff contends that the 15th section gives him a complete right of action, and that the 86th section does not qualify the 15th.

[THE LORD CHANCELLOR.— You speak of this power as being first conferred by the Act 5 Wm. IV. ; but the special verdict states that the engines now in use had been so in 1826.]

They had been so ; but their use was not lawful. It was afterwards made lawful ; but the right to compensation for damage thereby occasioned was granted at the same time. The former Acts were repealed, and the defendants can only take possession of this water under the last Act of Parliament. \*If \*818 they do take possession of it, they must take it with the liability to make compensation. Here the injury is occasioned by the exercise of the powers granted by the Act. The words of the granting part of the Act assume that there is an injury.

[THE LORD CHANCELLOR.— Not that there is, but that there may be.]

The water being required for the purposes of the Act, makes out the plaintiff's claim. The 86th section confirms the right of the plaintiff to compensation, as given by the 15th section ; for it requires the defendants to keep up the weirs over which the water is to flow from the lower level into the Tame. The principle laid down in the case of *Blakemore v. The Glamorganshire Canal Navigation*<sup>1</sup> must be applied to the present. The Act was procured by the defendants for their own profit and purposes, and must be strictly construed as against them.

*Mr. Whately* and *Mr. Phipson*, for the defendants in error. — The defendants have done nothing but what is fully authorised by the Act, and have not subjected themselves to any liability to make compensation. They have not taken any streams or brooks in which the plaintiff is interested, nor have they taken the water from the Tame above Wednesbury Forge ; but the water which, it is admitted, had properly been used in the upper and middle levels, and had flowed thence into the lower level, they have pumped back again, as they had done for some years before the passing of the Act under which compensation is now claimed. No real injury to the plaintiff — none which the law recognises as such —

<sup>1</sup> 1 Mylne & Keen, 154, 1 Clark & Finnely, 262.

is shown here ; so that even if the Act of Parliament was  
 \* 819 out of the question, the plaintiff \* would have no title to  
 recover. The Act only gives compensation where something  
 is done which, without the Act, would subject the defendants to an  
 action at law ; but pumping back water to do service afresh is not  
 an injury. Unless some injury is shown, no claim to compensation  
 exists. *Glover v. The North Staffordshire Railway Company*.<sup>1</sup> The  
 86th section only gave to the plaintiff the waste and superfluous  
 water running out of the lowest level, and not required for the  
 purposes of the Act. The special verdict found that there never  
 had been any other sufficient means, except those which the defend-  
 ants had employed, by which the upper and middle levels could  
 be kept in a state fit for navigation. The water pumped back was  
 not, therefore, waste or superfluous within the meaning of the  
 Act.

*The Solicitor-General*, in reply.—The 86th section does not  
 diminish, but confirms, the plaintiff's right to compensation. The  
 15th section authorises the defendants to raise the water of the  
 canals from one level to another, — that is a power now given by  
 the Act for the first time ; but then it is accompanied with the  
 duty to make compensation. The 86th section expressly forbids  
 the defendants from taking any water out of the Tame above Wed-  
 nesbury Forge, and requires them to make and maintain weirs,  
 that such water, and “ all the waste and superfluous water run-  
 ning into the Walsall Level, should be conveyed into the Tame.”  
 The duty of the defendants, as stated in the 15th section, is there-  
 fore enforced by the 86th section, which may, in truth, be taken  
 to particularize some of the acts in respect of which they are to  
 make compensation ; and one of these is plainly that of not al-  
 lowing the plaintiff the benefit of the superfluous water of  
 \* 820 \* the lowest level. This Act for the first time authorises  
 the defendants to pump back that water ; but then they  
 must do so under the powers granted by the Act, and must make  
 compensation according to the Act.

THE LORD CHANCELLOR. — In this case, I propose to put to the  
 Judges the following question : “ Whether, on the true construc-  
 tion of the 5 Wm. IV. c. 84, and on the facts found on the special

<sup>1</sup> 20 Law Journal, N. S. Q. B. 376.

verdict, the plaintiff is entitled to compensation in respect of the water which, having flowed into the lower level, is pumped back again to the upper level ? ”

The Judges retired to consider the question. After a short absence they returned, and BARON PARKE said : In answer to your Lordships’ question, I am authorised by the Judges now present to declare that we are unanimously of opinion that the plaintiff is not entitled under this Act of Parliament to any compensation on the facts found on the special verdict.

The 15th section of the Act does not give him any right to the water in the canal, as waste water, when it has once been used for the purposes of the navigation, but expressly gives the defendants power to pump back that water into the upper levels after it has flowed out of them ; and the 86th section merely requires the defendants to maintain weirs, to secure to mill-owners and others the benefit of the waste water flowing out from the lower level. The water which can be used again, and is pumped back for that purpose, is not waste water.

THE LORD CHANCELLOR. — After the unanimous opinion given by her Majesty’s \* Judges on this point (an opinion in \* 821 which I entirely concur), it seems to me that your Lordships are in a position to dispose of the question at once.

The plaintiff in the action, in the notice which he gave of the damage alleged to have been sustained by him, confined his claim to the acts done by the defendants in raising water from the lower level to the upper level in the canal. The question, therefore, which has been put to the learned Judges, entirely meets the point which is put on the record as to the damage here alleged to have been sustained. My own opinion, my Lords, completely coincides with that of the learned Judges, because I take it to be perfectly clear that, under the Act of Parliament, the defendants were entitled to retain the water which was in the canal (and the different levels did not prevent it from being one canal), for the purposes of the navigation. That was the only act they did, when the water escaped, naturally, in the working of the navigation, from the upper level to the lower level.

I think they were entitled to do that without making compensation to the plaintiff, and to do so independently and as an abstract



right. It does not appear to me, my Lords, that the plaintiff has shown any right whatever to the waters which are thus raised from the lower to the upper level. I have listened in vain to ascertain what right he has to any of the waters which actually find their way into this canal. If the defendants had taken any waters which they are not entitled to take under the Act of Parliament, then it would be a question, not for the compensation which is sought by the plaintiff under this Act, but it would be a matter of common right to be enforced by an action, and therefore cannot be taken into consideration in the case now before your Lordships.

I think it is quite unnecessary now to go further into this question, and I therefore move your Lordships that  
 \* 822 \* the judgment of the Exchequer Chamber be affirmed, with costs.

LORD BROUGHAM concurred.

*Judgment of the Exchequer Chamber affirmed, with costs.*

Lords' Journal, 26th June, 1852.

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#### COMMITTEE FOR PRIVILEGES.

1853. May 12.

#### THE EARL OF DONOUGHMORE'S CLAIM.

##### *Peerage. Evidence.*

An Irish earldom was created, and a holder of that earldom was afterwards created a viscount of the United Kingdom; the patent granting the viscounty described the grantee by the name and title of the Irish earldom. On the death of one holder of these titles his eldest son received a writ of summons to attend the House of Peers as an English viscount. He did so, and took his seat as a viscount. He subsequently petitioned to have his claim to vote for representative peers of Ireland allowed, and it was allowed. After his death, his son received a writ of summons as an English viscount, and took his seat in that character. He then petitioned to be admitted to vote for representative peers of Ireland in virtue of the Irish earldom. The petition came before the Committee for Privileges. The patents creating the Irish earldom and the English viscounty, the writ of summons to the previous viscount, and the entry on the Journals showing that the preceding peer had taken his seat, and likewise the

resolution of the Committee for Privileges admitting his claim to vote for representative peers, were all proved:—

*Held*, that this was not sufficient to establish the title of the present claimant; that the evidence must be such as would of itself, if the claim was now made without reference to any previous claim, be sufficient to establish it. Such evidence not being producible at the moment, the consideration of the claim was adjourned.

*Mr. Messiter* appeared for the claimant. — This is a claim by Richard John Viscount Hutchinson, to vote, as Earl of Donoughmore, for representative peers of \*Ireland. The \* 823 claim will be at once established, for the claimant already sits in this House. His pedigree was gone into when he was admitted to take his seat as a peer of the United Kingdom, under the title of Viscount Hutchinson. The letters patent creating the Irish and the British peerages will now be produced, and the limitations of the Irish earldom of Donoughmore and the English viscounty of Hutchinson will be shown to be the same, and to be made to the same person.

THE LORD CHANCELLOR. — Have you now any evidence by which, if the petitioner had not taken his seat in this House as Viscount Hutchinson, you can prove him to be entitled to the Irish earldom?

*Mr. Messiter*. — The claimant is not prepared with that evidence at this moment, for it was considered that, as the same limitations existed in both peerages, and both were conferred on the same person, the proof of one, and the admission to a seat in this House on that proof, would be sufficient proof of the other.

THE LORD CHANCELLOR. — But is it clear that a Committee of this House, sitting on a claim to one peerage, should take for granted that the evidence produced on a claim to a different peerage, though by the same person, has established the one under investigation?

*Mr. Messiter*. — Such has been the practice of this House. There were two instances of that sort in 1848, and one in 1849, in the Drogheda,<sup>1</sup> the Besborough,<sup>2</sup> and the Darnley<sup>3</sup> peerages.

THE LORD CHANCELLOR. — Your proposition is this, — that Viscount Hutchinson is, as Earl of Donoughmore, entitled to vote in the election of representative peers for Ireland, because you

<sup>1</sup> Proceedings of the Committee for Privileges (11 April, 1848), vol. 30, p. 425.

<sup>2</sup> Id. id. p. 430.

<sup>3</sup> Id. (31 July, 1849), vol. 31, p. 335.

\* 824 show that, on the death of the last Viscount \* Hutchinson, a writ was issued, summoning the heir of the late Viscount to take his seat in this House; and you say that the person who now claims to be Earl of Donoughmore is the same person who, as Viscount Hutchinson, was so summoned, and took his seat. That writ is not the best evidence of his right to this peerage. The two peerages are totally distinct. There may be another claimant to the earldom. It may be that the Lord Chancellor was deceived in issuing the English writ. There is no difference in principle between such a claim and an action of ejectment at common law. A. may have the better title as between him and B., but he may not have a valid title against all the world.

LORD BROUGHAM. — The evidence now tendered is certainly not the best evidence, and not such evidence as, looking to the analogy of other cases, this House has been in the habit of receiving; this House being, especially in peerage matters, more strict in its rules of evidence than other tribunals are.<sup>1</sup>

*Mr. Messiter.* — But the evidence is cogent here, for in the grant of the Viscounty of Hutchinson, the grantee is called the Earl of Donoughmore, and the grant is made to him in that name.

The Lords present in the Committee consulted together.

LORD REDESDALE. — The evidence tendered is not sufficient. The claimant must be shown by substantive evidence to be the Earl of Donoughmore. Such evidence as the claimant has here may be now produced; but if that is not sufficient in itself, the claim must be adjourned for other evidence.

The following documents were put in and read: —

\* 825 \* The patent creating the Irish earldom, dated 31st December, in the 41st year of the reign of Geo. III.; the English patent, creating the viscounty of Hutchinson, dated 14th July, in the 2d year of the reign of Geo. IV.: in this patent, the grantee was described as “Richard Earl of Donoughmore,” and the grant was made “unto him, the said Richard Earl of Donoughmore.” The entry in the journals of this House, dated 15th February, 1833, of “the Viscount Hutchinson (Earl of Donoughmore in Ireland)” taking his seat; the writ of summons, dated 18th

<sup>1</sup> See *Netterville Peerage*, 2 Dow & Clark, 342; *Braye Peerage*, 6 Clark & Finnelly, 757; *Fitzwalter Peerage*, 10 Clark & Finnelly, 946; *Wharton Peerage*, 12 Clark & Finnelly, 295, 304.

February ; and lastly, the journals of this House, dated 30th July, 1838, containing the resolution of the Committee for Privileges on the claim of "John Hely, Earl of Donoughmore, of that part of the United Kingdom called Ireland, and Viscount Hutchinson, of that part of the United Kingdom called England," to vote for representative peers for Ireland, was put in and read. The claim was at that time resolved to have been made out.

*Mr. Messiter* submitted that this evidence was sufficient to establish the present claim.

THE LORD CHANCELLOR. — Their Lordships do not think this evidence sufficient. The evidence must be such as would of itself, if the claim was now made without reference to any previous claim, be sufficient to establish it. A previous practice of a different kind, even if shown to have existed, cannot bind this Committee.

LORD BROUGHAM. — This is a case in which, if the learned counsel is correct, a lax practice has existed. If lax, it was *mala praxis*. It is possible that when I held the Great Seal I may have admitted such evidence as conclusive, and that my noble and learned friends, Lord Lyndhurst and Lord Cottenham, may likewise have done so ; but if so, we were wrong. The noble Lord, the Chairman of the Committee, to whom we are indebted for drawing \* attention to the matter, says that there have \* 826 been cases both ways. That of itself is enough to show that we ought to settle the practice one way or the other ; and I have no doubt, for the reasons stated by my noble and learned friend the Lord Chancellor, that the proper course is that which we now adopt.

THE LORD CHANCELLOR. — There has, perhaps, been a lax practice in former times, — it would have been a lax, and therefore *mala praxis* in my time, if the noble Lord in the chair had not objected to it ; for otherwise I should possibly have acted on the custom adopted by my predecessors. The practice is, however, clearly erroneous. It does not signify as to the claim to vote as the Earl of Donoughmore that the claimant has already been admitted to sit and vote as Viscount Hutchinson.

Claim adjourned for further evidence.<sup>1</sup>

<sup>1</sup> The Committee for Privileges in claims to vote at the elections for representative peers of Ireland may admit an entry on the Journals as evidence of limitations in a patent of peerage, without requiring the production of the patent. — In re Dufferin & Claneboye, 4 Clark & Finnelly, 568.

If a claimant omit to give evidence of the creation and limitation of one of several dignities to which he states in his petition that he is of right entitled, the Committee for Privileges will not report that he has made good his claim to that dignity on the presumption that it descended from the same ancestor with the other dignities to which the claimant has proved his right. — *Huntly Peerage*, 5 Clark & Finnelly, 349.

[The deficiency was in the proof of the creation of the earldom of Huntly. The proof of the claimant's descent from an earl of Huntly was given.]

The right to an Irish peerage having been the subject of investigation in the Irish House of Lords, the minutes of proceedings and evidence, including depositions taken by commissioners under an order of that House, were held admissible here (the witnesses being dead), not only against the Crown and other parties to that investigation, but also against a person who was not a party to \* 827 the proceedings, \* but was cognizant of them. — *Roscommon's Claims*, 6 Clark & Finnelly, 108, 129.

An adjudication (after petition presented to the Crown and referred by the Crown to the House) by the Irish House of Lords is an authority as binding on the House of Lords of the United Kingdom, as a like determination by the latter House, or by the English or British House of Lords before the Union, in matters of English or British peerage. But a resolution of either House, affirming a report of its committee, and recognising a right or privilege of peerage, is not equivalent to an adjudication upon a reference from the Crown. — *Earl of Waterford's Claim*, 6 Clark & Finnelly, 133.

The minutes of evidence and proceedings before the Committee for Privileges in one case are not necessarily receivable as evidence in another case. But they were allowed to be printed for the information of their Lordships. — *Brays*, 6 Clark & Finnelly, 766, 767.

Evidence twice previously given before Committees for Privileges [sitting on the same claim] allowed to be entered as read and reprinted, together with the proceedings on the present petition. — *Beaumont Peerage*, 6 Clark & Finnelly, 868.

The counsel for the claimant proposed to put in, amongst other evidence, minutes of proceedings before the House, in 1785, upon the claim of Col. Fullerton to the barony of Spynie, wherein it appeared that the then Attorney-General, on behalf of the Crown, had admitted the correctness of the pedigree exhibited by that claimant, showing that the last heir male of that branch was dead.

The committee, upon objection taken by the Lord Advocate, decided that such an admission was of no value in the present case. — *The Crawford & Lindsay Peerage*, 2 House of Lords Cases, 553.

1851. June 2, 3. 1852. June 30.

JAMES MILL, . . . . . *Appellant.*  
 SIR JOHN HILL, an infant, by his mother and next }  
 friend, and W. C. KYLE and M. McCausland, } *Respondents.*

*Irish Registration Act. Purchaser. Settlement. Constructive  
 Trustee. Indemnity. Improvements. Costs.*

Under the Irish Registration Act (6 Anne, c. 2) an equity in a grant which is registered will prevail against the right even of a *bonâ fide* purchaser to whom the original grantor has subsequently sold part of the property comprised in the registered deed.

If a man has a limited interest in a term and settles it to a certain use, and then gets a new and extended term substituted for it, he cannot, by so doing, avoid the previous settlement.

A deed contained recitals which described two persons as concurring in settling property to which they were "respectively entitled." It afterwards contained a grant to trustees of a certain part of this property, as if made by one of these persons, when in fact that part belonged to the other. The memorial of the deed described both as the granting parties; this description was not one of the things required by the statute:—

*Held*, not to vitiate the effect of the memorial under the Registration Act.

In 1830, a settlement of certain property held under renewable leases was made in favour of A. In 1831, A., being about to marry, made a settlement of this property for the uses of the marriage. The deed of 1830 was not registered. The settlement of 1831 was registered. In 1840, A., being in actual possession, sold to B., and B., who had no actual notice of the settlement of 1831, entered into possession, and made alterations in the premises. After the death of A., his son, who was entitled under the settlement of 1831, filed a bill against B. to set aside the sale, for an account, and for waste:—

*Held*, that it was not necessary to register the deed of 1830, that the registered settlement of 1831 prevailed against the *bonâ fide* purchase of B., and that the Court below had properly declared him to stand possessed of the leases as a trustee for the parties beneficially interested under that settlement.<sup>1</sup>

But *held* also, that he was entitled to indemnity against the covenants \*in 829 \* the leases which he was thus declared to hold as trustee; that an inquiry ought to be made as to alleged improvements and as to alleged waste; and that he was entitled to be allowed the benefits of those improvements; and that, being a *bonâ fide* purchaser, without misconduct, he ought not to be charged with costs.

<sup>1</sup> See *Eyre v. McDowell*, 9 House of Lords Cases, 619, 631; *Hickson v. Lombard*, Law Rep. 1 H. L. 329; *Carlisle v. Whaley*, Law Rep. 2 H. L. 399.

THIS was an appeal against a decree of the Court of Chancery in Ireland, in a suit instituted by these respondents, for the purpose of setting aside a contract for the sale of an estate called Brookhall, of which the appellant had become the purchaser from Sir George Hill, the father of the infant plaintiff.

The bill set forth facts, from which it appeared that Sir G. Fitzgerald Hill held various portions of land constituting the Brookhall estate, under renewable leases, the fee simple of such lands being vested respectively in Sir Robert Fergusson, Henry Lecky, and the Bishop of Meath, or his representative, Nathaniel Alexander, Esq. All these leases contained agreements for perpetual renewal. By an indenture, dated 29th October, 1830, and made between Sir G. Fitzgerald Hill, of the one part, and George Robert Dawson, of the other part, it was witnessed that, in consideration of the natural love and affection of Sir G. Fitzgerald Hill for his nephew, George Hill, the said Sir G. Fitzgerald Hill conveyed to Dawson, his heirs, &c. certain premises called Brookhall, in the liberties of Londonderry, to hold on the trusts therein declared to the use of Sir G. Fitzgerald Hill, and his wife, Jane, Lady Hill, for life, and after the death of the survivor of them, to the use of the said George Hill, his heirs and assigns, for ever. This settlement was not registered.

On the 29th of April, 1831, a settlement was made between John Rea and Eliza Sophia, his daughter, of the first part; \* 830 \* George Hill, of the second part; T. Mansell and M. McCausland, of the third part; and two other trustees, of the fourth part. This settlement recited Rea's title to several premises, which were enumerated, and also the deed of October, 1830; and that G. Hill claimed to be entitled to certain lands, expectant on the death of his uncle without issue; that a marriage was intended to take place between George Hill and Miss Rea, and that, in consideration thereof, &c. he, the said John Rea, and the said George Hill, according to their respective rights, titles, and interests in the therein-before recited lands, tenements, &c. granted and released, &c. to Mansell and McCausland certain premises belonging (as shown in the previous recitals) to John Rea. The indenture then went, "that for the considerations aforesaid, &c. he, the said John Rea, hath granted to, and by these presents doth grant, &c.," unto Mansell and McCausland, certain premises previously described as belonging to Rea, "and also all that messuage, tene-

ments, and dwelling-house situated at Brookhall," describing the premises settled in the deed of October, 1830. The *habendum* was during the lives of the *cestui que vies*, and the lives to be added for the terms of years mentioned in the leases or renewals, or to be added to them upon trust for George Hill for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of George Hill, by the said Eliza Sophia, successively in tail male. Then came a covenant by George Hill to convey future property to the trusts of the same settlement. There were also covenants by Rea for further assurance, but no covenants for title by Hill. This settlement was registered under the 6 Anne, c. 2,<sup>1</sup> and the memorial described Rea and Hill to be the granting parties.

<sup>1</sup> The 6 Anne, c. 2, is declared by the preamble to be passed "for securing purchasers, preventing forgeries, and fraudulent gifts and conveyances of lands, tenements, and hereditaments, which have been frequently practised in this kingdom. The third section enacts that "a memorial of all deeds, &c. which, after the 25th day of March, 1708, shall be made and executed, whereby any honour, manors, lands, tenements, or hereditaments within this kingdom may be any ways affected, may, at the election of the party or parties concerned, be registered in such manner as is hereinafter directed."

By the 4th section of which it is enacted, that "every deed or conveyance, a memorial whereof shall be duly registered according to the rules and directions in this Act prescribed, shall, from and after the 25th day of March, 1708, be deemed and taken as good and effectual, both in law and equity, according to the priority of time of registering such memorial, for and concerning the honours, manors, lands, tenements, and hereditaments in such a deed or conveyance mentioned or contained, according to the right, title, and interest of the person so conveying such honours, manors, lands, tenements, and hereditaments, against all and every other deed, conveyance, or disposition of the honours, manors, lands, tenements, or hereditaments, or any part thereof, comprised or contained in any such memorial as aforesaid."

The 5th section enacts "that every deed or conveyance not registered, which shall be made and executed from and after the 25th day of March, 1708, of all or any of the honours, manors, lands, tenements, or hereditaments comprised or contained in such a (*sic*) deed or conveyance, a memorial of which shall be registered in pursuance of this Act, shall be deemed and adjudged as fraudulent and void, not only against such a deed or conveyance registered as aforesaid, but likewise against all and every creditor and creditors by judgment, recognizance, statute merchant, or of the staple, confessed, acknowledged, or entered into, from and after the 25th day of March aforesaid, as for and concerning all or any of the honours, manors, lands, tenements, or hereditaments contained or expressed in such memorial registered as aforesaid."

The 7th section enacts "that the memorial shall contain the date of the deed, the names and descriptions of the parties, and of the witnesses, and it shall



\* 831     \* The marriage took place, and the present Sir John Hill was the eldest son. Mansell, one of the trustees under the deed of 1831, died, and W. C. Kyle was, in pursuance of a power therein contained, appointed in his place. Jane Lady Hill died in 1837, and Sir G. Fitzgerald Hill, her husband, died in \* 832 1839, and George Hill then succeeded to \* his uncle's title, and, under the deed of 1830, entered into possession of Brookhall. It appeared that, in the course of a few years, a large arrear of rent had accumulated, and Sir Robert Fergusson took proceedings to re-enter into possession of the lands; obtained judgments in ejectment, on which writs of *habere* issued, and possession was taken in a formal manner, so as to determine these existing terms. In November, 1840, Sir George Hill entered into a negotiation with Mr. James Mill for a sale of all his right, title, and interest in Brookhall, for the sum of 1000*l*. Of this sum, about 409*l*. were to be paid to Sir R. Fergusson, on account of rent in arrear, and costs in the ejectment proceedings; and on payment thereof, Sir Robert Fergusson, at the instance and request of Sir George Hill, consented to renew the leases of his portion of the property; and by lease of the 18th January, 1842, did demise to Mill all that part of Brookhall held under him, Sir Robert Fergusson, for two lives, or seventeen years, with a covenant for future renewal.

The bill then alleged that, as part of the arrangement, Sir George Hill obtained a lease of the lands held under Lecky, dated the 1st April, 1841, for 999 years; and in part consideration of the 1000*l*. by deed of the 1st August, 1842, assigned to Mill the portion of the lands so demised to him; and that, in further pursuance of the agreement, and in part consideration of the \* 833 same sum, Sir George Hill \* gave Mill possession of the lands held under Alexander; and that Mill claimed to hold all those lands discharged of the trusts created under the deed of 1831, which affected all of them. It then stated the death of Sir George Hill in December, 1845, and charged that all these transactions had taken place between Mill and Sir George Hill, express or mention the honours, lands, &c. in such manner as the same are expressed or mentioned in such deed," &c., and then directs "that every *such* deed, conveyance, or will, or probate of the same, of which such memorial is to be registered as aforesaid, shall be produced to the said register [registrar] or his deputy, at the time of entering such memorial, who shall indorse a certificate," &c.

without the privity of the trustees, for the purpose of defeating the trusts of the settlement of 1831, which it alleged to have been duly registered, and of which it alleged that Mill had notice ; and it went on to charge that Mill had committed certain acts of waste; by pulling down a portion of the house, and cutting valuable and ornamental timber ; and it prayed that Mill might be declared a trustee for Sir John Hill of the leases, &c. vested in him under the settlement of 1831 ; that such leases might be declared to be grafts on the original leases held by Sir G. Fitzgerald Hill and Sir George Hill, and that Mill might be decreed to assign the same to Kyle and McCausland for the remainder of the terms, and to deliver up the leases, or renewals of leases, vested in Sir J. Hill, as aforesaid ; and to deliver up possession of the premises, and to account for trees, shrubs, and the materials of the house, and for waste generally, and to pay compensation for the same ; and that all sums for which he was liable might be paid by him to Kyle and McCausland, to be held by them under the trusts of the settlement of 1831, and to be restrained from committing further waste.

The appellant, by his answer filed on the 16th October, 1846, alleged that he was a purchaser for valuable consideration, without notice of any equity as claimed in the bill ; he denied his knowledge of the deed of October, 1830 ; alleged that there was no registry of any such deed, and though he admitted that there was a registry of the deed of April, 1831, he alleged that, at the time of making the purchase, he was altogether ignorant of it ; and he set \* forth the leases and the assignments to himself, and \* 834 claimed the estate of Brookhall absolutely in his own right, and for his own use, and freed and discharged from any trust contained in the settlement in the bill mentioned. And he insisted that, as Sir G. Fitzgerald Hill was no party to the marriage settlement of 1831, and lived for many years after the date of that deed ; and as Sir George Hill, at the time of the appellant's purchase and taking possession of the house and lands, was in possession thereof, as the apparent owner ; and as the appellant had no notice of any estate, title, or interest in the plaintiffs, as alleged in the bill, the plaintiffs had no title to the relief sought. The appellant also denied the alleged waste, and insisted, on the contrary, that he had expended considerable sums of money in repairs and improvements.

The cause was brought to issue, and witnesses were examined on

both sides. The allegations of fact as to the manner in which Sir George Hill had conducted himself in disposing of the property to the appellant were proved, and it was also proved that the deed of 1831 was duly registered. In 1848, the Lord Chancellor (the Right Hon. Maziere Brady) made a decree<sup>1</sup> by which it was declared that Mill was a trustee for the plaintiff (Sir G. Hill) of the portions of the house and demesne lands of Brookhall, held under Sir R. Fergusson and Mr. Lecky, and of the several and respective terms for which he, Mill, had obtained leases thereof respectively, and that the leases were grafts on the original leases, by which the lands were held by Sir G. Fitzgerald Hill and Sir G. Hill. And it was ordered that Mill should assign the same to the plaintiffs, Cotter and McCausland, for the remainder of their respective terms, and deliver up to them the leases, and agreements for leases, of the said portions, which had come into his hands \* 835 from Sir G. Hill, and the leases obtained by him in \* his own name and for his own use. And the plaintiffs were declared entitled to receive the rents of the said lands which had accrued since the death of Sir G. Hill. And a reference was made to the Master to ascertain the amount of the rents. And the defendant was declared entitled to the sum of 409*l.*, being the amount paid by him to Sir R. Fergusson for arrears of rent due for the lands held under him at the date of the renewal in January, 1842, with interest thereon at five per cent. from that period until liquidated by the rents and profits of the aforesaid portions of Brookhall over and above the head-rents and other lawful outgoings, &c. And the Master was ordered to fix an occupation-rent on the said portions. And the defendant was declared chargeable (to the extent of 409*l.*, with interest as aforesaid) with such occupation-rent from the 1st of November, 1841, to the 15th of December, 1845, the day of the death of Sir G. Hill, deducting therefrom the head-rents, &c. according as the same were chargeable up to that period. And the defendant was declared chargeable with an occupation-rent, to be determined by the Master, from the death of Sir G. Hill. And the defendant was to have credit against this occupation-rent for all head-rents and other lawful outgoings from the same period, and he was to be enjoined from removing trees and shrubs, &c., or committing other waste on the portions of Brookhall held under Sir R. Fergusson and Mr. Lecky

<sup>1</sup> 12 Irish Eq. Rep. 107.

as aforesaid. And the defendant was ordered to pay the costs of the suit, except as to that part of the bill which related to the land held under the Bishop of Meath or Mr. Alexander, and which was thereby dismissed with costs. The defendant now appealed against that decree.

*Mr. J. Parker* and *Mr. H. Terrell*, for the appellant. — This is a bill against an innocent purchaser for valuable consideration, whose legal title is sought to be impeached on account of a \* deed, of which he had no notice. The \* claim of the \* 836 respondents is purely one of an equitable nature, and, *primâ facie*, a legal title, such as that of a purchaser for a valuable consideration, shall prevail against an equitable claim. By the Irish Registry Act, no party is bound to register a deed, but he may register it if he pleases; and if he should, his title, being good, shall prevail over an equally good title which has not been registered. That is all that the Registry Act does; but the Court in this case has gone much further, and acted on the notion that registration is necessary and conclusive. That is an error. Even under the English Registry Acts, which, by declaring deeds not registered void as against subsequent *bonâ fide* purchasers, do compel registration, this judgment could not be sustained. In *Wrightson v. Hudson*,<sup>1</sup> decided by Sir J. Jekyll, and in *Bedford v. Backhouse*,<sup>2</sup> before Lord King, the principle acted on was, that registration gives no greater efficacy to deeds that are registered than they had before, although the statute avoids, in favour of subsequent purchasers, deeds good in themselves that have not been registered. In *Morecock v. Dickins*,<sup>3</sup> the latter case was cited and commented on, and there Lord Camden held that registration, in Middlesex, of an equitable mortgage, is not presumptive notice, of itself, to a subsequent legal mortgagee, so as to take from him his legal advantage. If so, still less can it affect the rights of a *bonâ fide* purchaser.

Registration is not of itself notice. That has been expressly decided, with respect to the Irish Registry Act, by Lord Redesdale in *Bushell v. Bushell*,<sup>4</sup> and *Latouche v. Lord Dunsany*.<sup>5</sup>

<sup>1</sup> 2 Eq. Cas. Abr. p. 609, pl. 7.

<sup>2</sup> Ambler, 678.

<sup>3</sup> 2 Eq. Cas. Abr. p. 615, pl. 12.

<sup>4</sup> 1 Schoales & Lefroy, 90.

<sup>5</sup> 1 Schoales & Lefroy, 137, 157. See this case, *notm.* Chamley v. Dunsany, in the House of Lords, on appeal, 2 Schoales & Lefroy, 690.

\* 837 The registration of a deed had long \* before been held by the House of Lords in an Irish case not sufficient to prevail against the rights created under a deed which had not been registered, if by doing so a fraud would be committed, and an innocent person injured. *Forbes v. Deniston*.<sup>1</sup> So far, therefore, the principles of law and the provisions of the Registry Acts are not in conflict with each other.

[LORD BROUGHAM.— But these judicial decisions do certainly look like repealing the Registry Acts.]

Here the Registry Act has not been complied with by the party who seeks to take advantage of it. The original deed made by Sir G. Fitzgerald Hill was not registered; the subsequent deed, that to which Sir G. Fitzgerald Hill was not a party, alone was registered; but the memorial of that deed was incorrect. No merely derivative title can be validly registered,—it is like an assignment of a lease, the registration of which has been decided in England to be of no value if the original lease is not registered. *Honeycomb d. Halpen v. Waldron*.<sup>2</sup> The registration of the settlement of 1831 is nothing, therefore, without the registration of the settlement of 1830. For aught that the appellant could discover by the register, Sir George Hill might have become possessed of the property as heir at law, and might have an absolute right to dispose of it. Besides which, the appellant found Sir G. Hill in actual possession. The object of the Registry Acts is to give information. Here none was given that would put a purchaser on his guard. The principal deed must be registered, or the others will have no force. That is the rule in Ireland, as well as in this country. Thus in *Jack v. Armstrong*<sup>3</sup> it was held that when A. had conveyed by an unregistered deed to D., and then conveyed by an unregistered deed to B., who afterwards conveyed \* to C., the registration of the conveyance from B. to C. was not a registration of the conveyance from A. to B., and both were postponed to the prior unregistered conveyance from A. to D., because A. having granted to B., had nothing left in him to be granted except by a registered deed to be executed by himself. The same doctrine was afterwards adopted and

<sup>1</sup> 4 Brown, P. C. 189. Fraud case, 11.

<sup>2</sup> 2 Strange, 1064.

<sup>3</sup> 1 Hudson & Brooke, 727, Appendix I. Cited in Sugden, Vend. & Purch. (11 ed.) 977.

applied in *Fury v. Smith*,<sup>1</sup> where A., possessed of a term for years, conveyed to B. by an unregistered deed, B. conveyed to C. by a registered deed, and afterwards the sheriff, under writs of *fi. fa.* against A. and B., sold the term to D., and the assignment from the sheriff to D. was registered. The unregistered assignment from A. to B. was held to prevail over the registered assignment to D., because B. was in visible possession of the land. The case of *Warburton v. Loveland*,<sup>2</sup> though the decision appears unfavourable to the appellant, contains in the reasoning of the Judges the strongest authority in his favour. It is again and again said, that the object of the law was to protect a *bonâ fide* purchaser; and that object would be entirely defeated could this judgment be sustained.

The registration of the settlement of 1831 is of no value. That settlement purports to be a conveyance of part of the Brookhall estate by Rea. Now Rea had no property in it, and therefore, if the appellant had looked at the register where the deed is supposed to be copied, he would only have been misled. It cannot operate against his interests, for nothing could pass by such a deed. *Haselwood v. Mansfield*.<sup>3</sup>

The decree is, besides, erroneous in form. The decree directs Mill to stand possessed of these leases as a trustee, and then it directs him to assign and convey them; but it does not direct him to receive any indemnity in his character of constructive trustee against the rents and covenants \* contained in the \* 839 leases of which he is to be treated as the trustee. The indemnity ought to have been directed in conformity with the decree in *Fitzgibbon v. Scanlan*, which was affirmed in this House.<sup>4</sup> Again, there is no direction that the Master is to inquire whether the alterations made by Mill in the house were not substantial improvements, the value of which is to be ascertained and allowed to him. And lastly, he contends that he ought not to be subjected to costs, but ought to be relieved from them, he being a *bonâ fide* purchaser, without notice and without misconduct.

*Mr. Napier* and *Mr. McCausland*, for the respondents. — The cases cited on the other side might be relied on for the respondents. The decisions in England, which appear to restrict the operation of

<sup>1</sup> 1 Hudson & Brooke, 735, Appendix II.

<sup>2</sup> 2 Ventris, 196.

<sup>3</sup> 1 Hudson & Brooke, 623, 2 Dow & Clark, 480.

<sup>4</sup> 1 Dow, 261.

the Registration Acts, do not affect this question, for the English and Irish Registration Acts are different from each other. *Bushell v. Bushell*,<sup>1</sup> *Eyre v. Dolphin*,<sup>2</sup> *Browne v. Blake*,<sup>3</sup> *Jones v. Kearney*,<sup>4</sup> and *Thompson v. Simpson*,<sup>5</sup> comprising the judgments of Lord Redesdale, Lord Manners, Sir A. Hart, and Sir E. Sugden, are the best expositions of the Irish Registration Act, and they show that, admitting without question the English decisions, the Irish Act gives a priority, an authenticity, and a force to a registered deed, which under no circumstances can belong to one that is not registered.

It is said that the title of Sir George Hill was a derivative, and not an original title, and therefore that the registration \* 840 of Sir George Hill's deed was of no value, but that \* that of Sir G. Fitzgerald Hill ought to have been registered, and, not being registered, could not affect the purchaser, who might have purchased from Sir George Hill as heir at law of his predecessor. This argument has been raised by the counsel for the appellant on coming to a knowledge of the facts of the case. The appellant himself did not raise it in his answer, for he there swore that he did not know that the indenture of October, 1830, had ever been made, nor how or in what manner the demesne lands of Brookhall were held by Sir George Hill. The appellant cannot pretend that he believed Sir George Hill to have been the heir at law, for he purchased of Sir George Hill a chattel interest; and he could not have purchased such an interest from one who was merely heir at law, for a chattel would go to the executor, and not to the heir. The appellant had, therefore, no excuse for not looking into the title of the person from whom he purchased.

The manner in which Sir George Hill got this property is not material. The registry of the deed of 1830 was therefore needless. He was bound by the deed of 1831, which vested the leases in certain persons on trusts therein stated. That deed was registered, and the title under it, of which notice was thereby given to all who used due diligence and searched, takes priority from the date of registration. The purchaser was bound to search the registry; and the fact that he was a purchaser for a valuable consid-

<sup>1</sup> 1 Schoales & Lefroy, 90.

<sup>\*</sup> 1 Molloy, 368.

<sup>2</sup> 2 Ball & Beatty, 290.

<sup>3</sup> 1 Drury & Warren, 134, 4 Irish Eq. Rep. 74.

<sup>4</sup> 1 Drury & Warren, 459, 485.

eration does not relieve him from the necessity of searching to see what is the state of the title which he purchases. Had the appellant made the proper searches, he could easily have discovered the deed, for there are two lists kept under this Act, — one, of the names of the parties; and the other, of the names of the lands. If the memorial was registered according to the Act, that is sufficient. The appellant was rightly ordered to stand as a trustee for the respondents. *Stuart v. Ferguson*,<sup>1</sup> *Eyre v. Dolphin*,<sup>2</sup> \* *Dunbar v. Tredennick*.<sup>3</sup> The first of these cases is pre- \* 841  
cisely in point with the present.

The property here did pass under the settlement of 1831; for though there was a mistake in the forms of expression in that settlement, the Court will look at the whole of the deed, and finding from the general context what was the intent of the parties who executed it, will give effect to that intent. *Lord Saye and Seal's Case*,<sup>4</sup> and *Trethewy v. Ellesdon*.<sup>5</sup> *Haselwood v. Mansfield*,<sup>6</sup> which was the case of a charter party, does not apply to the present.

The lease, which was renewed in favour of Sir George Hill, and by him assigned to the appellant, must be taken to have been renewed for the purposes of the trusts of the will. It is only a continuation of Sir George Hill's former interest, — a mere graft on the previous lease, — *Randall v. Russell*;<sup>7</sup> and is therefore part of the subject of the settlement, — *Rawe v. Chichester*,<sup>8</sup> where the principle of this doctrine is explained. That principle is ably commented on in a note by Mr. Butler, who gives a suggestion as to the cause of its original application.<sup>9</sup> Upon this principle it was held, in *Winslow v. Tighe*,<sup>10</sup> that where an annuity was charged by will upon a renewable leasehold interest, “during the term of the lease,” and the lease was renewed, the annuity was a charge upon the renewal obtained by the devisee.

The form of the decree is right, and the appellant has no title to ask for an indemnity against acts of his own, or for what he calls improvements, but which the persons entitled under the settlement charge to be waste.

<sup>1</sup> 1 Hayes Irish Exch. Cases, 452.

<sup>2</sup> 2 Ball & Beatty, 290.

<sup>3</sup> 2 Ball & Beatty, 304.

<sup>4</sup> 10 Mod. 40.

<sup>5</sup> 2 Ventris, 141.

<sup>6</sup> 2 Ventris, 196.

<sup>7</sup> 3 Merivale, 190.

<sup>8</sup> Ambler, 715.

<sup>9</sup> 1 Co. Litt. 290 b. xi.

<sup>10</sup> 2 Ball & Beatty, 195.



\* 842     \* *Mr. Parker* replied. — The opinion of the profession in Ireland, as to the effect of the Registry Act in Ireland, is stated in “*Molesworth on the Registry Act*,” where it is said,<sup>1</sup> that “an unregistered conveyance is only postponed to a registered: it is valid against the grantor, and all deriving under him, by conveyance, marriage, &c.”; which is exactly what the appellant here contends. Again, it is said:<sup>2</sup> “Deeds operate as to acts of the granting parties; so that, if a person executes a deed as a consenting party, and afterwards another deed inconsistent with it as a granting party, which last is first registered, the first will not be postponed merely because it is executed by the same party as the second.”

As to the form of the decree, it ought to be such as was adopted by this House in *Fitzgibbon v. Scanlan*,<sup>3</sup> where the Court below, on appeal, having introduced a clause of indemnity, this House expressly affirmed it.

1852. June 30.

LORD TRURO, having stated the bill and answer, and the decree, said: Against this decree there is an appeal, and in the argument at your Lordships' bar, several points were made. First of all, it was insisted that, from the terms of the settlement in 1831, under which the present appellant claims, nothing in truth passed to the trustees under that settlement, with respect to Brookhall. That objection arose under these circumstances. The settlement begins by a recital of the intended marriage, and that it was agreed that the property should be settled to the use of that marriage, as well as by Mr. Rea, the lady's father, as by Sir George Hill; and then it proceeds to recite a great number of grants and instruments under which Mr. Rea, the lady's father, held

\* 843     certain property. Then it recites the settlement \* of 1830.

It then proceeds to state that the said John Rea and the said George Hill, according to their respective rights, titles, and interests in the property therein mentioned, have granted, and by these presents, — the expression is, “doth grant,” certain lands. In the first witnessing part of the deed are included all lands as to which there were previous recitals of their belonging to Mr. Rea. Then there is introduced a second witnessing part: “And this indenture further witnesseth, that for the considerations aforesaid,

<sup>1</sup> Page 36.

<sup>2</sup> 1 Dow, 261.

<sup>3</sup> Page 56.

the said John Rea doth grant" — and then he grants Brookhall. And that is followed by a covenant on the part of Sir George Hill to settle future estates, and give further assurance, and some other matters which are not now material to be considered.

It is obvious upon the face of the deed, that the property of Brookhall had belonged to Sir George Hill, and not to Mr. Rea, and if the intention of the parties to convey the lands which are the subject of the settlement, according to their several interests, had been properly followed out, of course Sir George Hill would have conveyed Brookhall; but instead of that, by a mistake, Mr. Rea is made to convey that estate. It is therefore insisted that the deed, so far as concerned Brookhall, was inoperative, and that in truth nothing passed. That is the first objection made with regard to the interest claimed by the plaintiff below under the deed.

It is, however, said by the respondents, that supposing it should be held, that although the legal estate and interest in Brookhall did not pass under that deed, by reason that the person named as grantor had no interest in the property, and that there was no grant by Sir George Hill, who had an interest in the property, still it is contended that an equity passed. But then the appellant replies, I deny that that equity ought to operate against me, considering \*that I stand in the situation of a *bonâ fide* \* 844 purchaser for a valuable consideration without notice; to which it is answered on the part of the respondent, that it is now to be considered as settled law, that the conveyance of an equitable interest under the Irish Registration Act, 6 Anne, c. 2, constitutes a good and available conveyance, entitled to priority against all subsequent grants which may affect the same property.

It is contended by the appellant, that whatever may be the case with regard to the general rule of law or the rule of equity, the law, as it prevails in a Court of Equity, independently of the statute, namely, that where a person has acquired an equitable interest, and that equitable interest is sought to be defeated by some subsequent grant, and the grantee under that subsequent grant acts *bonâ fide*, and without notice of the previous grant, if he obtains the legal estate, the equities between the two parties being equal, the legal estate must prevail, and the grantee under the first equity must therefore fail in obtaining the object of his grant. That is the first objection to the judgment of the Court below.

As regards the second objection which has been made here, I do not perceive whether that objection was made below, or not ; I can only infer that it was not. In the report of this case in the Court below, the arguments of the counsel are set out so shortly, that you cannot very well tell what arguments were employed ; but I do not observe that the Lord Chancellor in his judgment takes any notice of this point at all, and therefore I presume that it was not made below. But it is said here that the memorial of the register of the deed of 1831 was incorrect, and ought not to be deemed a register of that deed ; and that objection arises out of this state of circumstances. The settlement of 1831 wit-

\* 845 nessed in the first part of the deed that both parties, \* Mr.

Rea and Sir George Hill, conveyed, granted, and assigned various properties, and then it appears that, under the second witnessing part of the deed, Mr. Rea conveys Brookhall. The memorial of the deed states that it is a memorial of an indenture by which Mr. Rea and Sir George Hill granted all the property mentioned in that deed, making, therefore, no distinction, such as exists in the deed itself, as to Brookhall, which was there granted erroneously by Mr. Rea ; but it treats Sir George Hill as having been the party granting in terms Brookhall, or at least as granting it jointly with Mr. Rea. It is said that that is such a misdescription of the deed as ought to affect it.

It is further insisted on the part of the appellant, that the plaintiff below is not entitled to the benefit of the protection given by the 4th section of the Irish Registration Act, by reason of the omission to register the settlement of 1830, that is, the settlement by Sir G. Fitzgerald Hill upon Sir George Hill ; it is said that that is the root of the title, and that the registration of the derivative conveyance is no registration of the original conveyance, and therefore, under the authority of certain cases which were mentioned, to which I shall presently advert, it is contended that for want of that settlement of 1830 being registered, the registration of that of 1831 is unavailable.

Then, my Lords, there are certain objections to the details of the decree. First of all, that it does not direct an indemnity to be given to Mr. James Mill, in his character of constructive trustee, against the rents and covenants which are reserved and contained in these instruments, of which he is so declared to be a trustee, and which he is directed to assign. He insists that, under

such circumstances, he is entitled to an indemnity, which the decree does not give him ; he further insists that there ought to have been also a reference to ascertain whether or not those matters \* which he had performed with regard to the estate \* 846 were substantial improvements, the expense of which he ought to be allowed. The decree is silent upon that subject, and he insists that it is erroneous in respect of that omission. He further insists that the decree subjects him to costs, whereas this is not a case in which he ought to be charged with the costs, for that, being a *bonâ fide* purchaser without notice, and not having misconducted himself in the least, but being brought into this situation by the suppression, on the part of Sir George Hill, of the settlement which he had made, he has done nothing which should render him liable to costs. He has paid his money as a *bonâ fide* purchaser ; he has dealt with the property as his own, and has substantially increased its value by what he has done ; and he says that, if it is now taken away from him under the doctrine that he is a constructive trustee, he ought to have an allowance for so much of his expenditure upon the property as shall be found to have increased its permanent value. Such are the points which have been made.

First, with respect to the deed of settlement of 1831, it was said by the Lord Chancellor of Ireland, in giving his judgment in the Court below, that considerable doubts might be entertained whether the error which occurred in the deed, of making Mr. Rea the grantor instead of making Sir George Hill the grantor, had the effect of preventing the estate from passing. The Lord Chancellor thought that, as it is apparent upon the face of the deed that it was the intention of all parties to that instrument that Sir George Hill should be the grantor, the existence of such an intention would enable even a Court of Law to construe the deed rather according to the apparent intention than according to its literal terms. But, at all events, he expresses himself confident that such intention had the effect of subjecting the estate to a charge in equity, which might be enforced by \* com- \* 847 pelling a conveyance upon the trusts of that settlement in which it was intended to have been conveyed in point of law.

Now I doubt if it will be necessary to express any opinion at all on the part of your Lordships with regard to whether Brookhall did or did not pass at law. Certain authorities are cited, as tend-

ing to support the doctrine that it did not pass at law. I have examined those cases, but it does not appear to me that any one of them warrants that supposition. The general rule of construction is, that the Courts, in construing the deeds of parties, look much more to the intent to be collected from the whole deed, than from the language of any particular portion of it. The intent must be collected from the deed itself, and not from evidence *aliunde*; and the Courts consider themselves authorised and bound, where they can collect the intent from the language of the deed, if all the parts of the deed will admit of it, to construe that deed rather according to the general intent than according to any particular phraseology contained in it.

The first case that is mentioned is the case of Lord Saye and Seal.<sup>1</sup> It appears upon the face of the deed, that Lord Saye and Seal was intended to be the grantor, but in the granting part of the deed there are the words "hath granted," and so on, using the usual words of a grant; but it does not say who "hath granted." The Court, however, upon looking at the whole deed, said that it appeared to be executed by Lord Saye and Seal, and that it was perfectly obvious that he intended to grant, and therefore, though his name was not mentioned in the granting part, yet having executed it, and the whole contents of the deed manifesting that he was the intended grantor, there was enough evidence to say that the words "hath granted" applied to him.

\* 848 \* There is, however, a distinction between that case and the present. This is not a case where there is the absence of the name of the grantor, nor one where the language is uncertain or ambiguous; it is the case of an express grant by one person in terms which the Court is asked to construe as amounting to a grant by another; to reject, therefore, the precise and distinct terms in the granting part of the deed,—to take out one name and in effect insert another, according to the supposed intent. The case of Lord Saye and Seal does not go so far as that; it stops, as it appears to me, very far short of it. The Court there only held, that where, upon the face of a deed, it appeared that an individual who had executed the deed intended to grant, and the deed stated that something had been granted, though there was an absence of the statement of the person who made that grant, still it might be construed to be the grant of the person who upon the

<sup>1</sup> 10 Mod. 40.

face of the deed was intended to grant, and who had executed that deed. That is the effect of the first case that was cited.

The next case which was cited was the case of *Trethewy v. Ellesdon*.<sup>1</sup> Now there, the deed recited that Elizabeth Cossen had surrendered the grant of an annuity to Nicholas Cossen. The parties to that deed are Nicholas Cossen, of the one part, and Elizabeth Cossen and Nicholas Cossen, the younger, son of the said Elizabeth, of the other part. After having cited the surrender by Elizabeth Cossen to Cossen the elder, it then goes on to state, "hath granted a certain annuity to Elizabeth Cossen," not mentioning the name of the grantor. And then it proceeds, "hath granted a certain rent-charge or an annuity issuing out of his barton," &c. Then comes the *habendum*, "to hold to Elizabeth Cossen and Nicholas Cossen the younger." Now, nothing can be more distinct than the intent apparent upon that

\* deed. The first recital is the surrender of the first grant \* 849 to Nicholas Cossen the elder. Then it says, that this surrender having been made, "hath granted this annuity issuing from his barton"; and then the *habendum* shows that the persons who are intended beneficially to take under that grant of the annuity are Elizabeth and Nicholas Cossen the younger. It was quite impossible to doubt the intention there; and the decision follows the case of Lord Saye and Seal, by not requiring that the name of the grantor should immediately precede the grant, no other name as grantor being introduced, and it being followed by the *habendum* to the other parties to the deed. It was, in fact, perfectly obvious what the intent was, and the Court in that case did that which had been done in the previous case, and no more.

The next case is to be found in the same book. *Haselwood v. Mansfield*.<sup>2</sup> It was an action upon a charter party, and in a certain part of it there was an obligation to pay a penalty on a given event, it distinctly appearing who was the party to pay that penalty; but when it came to the obligatory part, it omitted to say that he bound himself; the word "*ipse*," the deed being in Latin, was omitted. Three of the learned Judges, Chief Justice Pollexfen and two others, held, — upon special demurrer, be it observed, — that the allegation was imperfect in not stating that the defendant had bound himself. Ventris differed, and, with great respect to the others, I think he differed properly. Considering, however,

<sup>1</sup> 2 Ventris, 141.

<sup>2</sup> 2 Ventris, 196.

that case to have been upon special demurrer, and considering also the nature of the obligation, it does not appear to me to go very far either way with respect to the general doctrine.

I have thus stated what the cases were, and have called your Lordships' attention to the circumstance, that in construing \* a grant, on the face of which the intention of the parties is clearly shown, namely, that a particular individual should grant; and where the tenor of the grant itself assists in showing that intention, but where the name of the grantor is not repeated, the Court will supply that name from the other parts of the deed. I have also called your Lordships' attention to the fact which distinguishes those cases from the present, namely, that here we have two real grantors, and that the name of one of them is improperly prefixed to a grant of one particular portion of the property which did not belong to him.

The general principle — that of construing a deed according to the intention, where by any possibility you can do so — is clear enough. The only authority bearing distinctly upon the application of that principle is a case of *The Bishop of Gloucester v. Wood*.<sup>1</sup> In that case, the Bishop of Gloucester was seised of a manor, and he demised twenty acres of that manor for lives, subject to a certain rent, and to the rendering a heriot upon the death of each of the lives during which the grant was to enure. He afterwards demised the manor. One of the lives mentioned in the lease of twenty acres dropped, whereupon the lessee of the manor seized the heriot. The bishop said: "That heriot is mine, and not yours. It is true, I have demised the manor to you, but that meant so much of the manor as I was in possession of; but I had previously severed twenty acres by a lease to somebody else, and therefore the Court will construe that grant according to the intention of the grantor, will hold that you take only so much of the manor as was in my possession when I made the grant to you, and that, as I had previously severed twenty acres from the manor, they did not pass by the grant," — and accordingly \* the bishop brought trover for \* the heriot. It was then said by the counsel in the argument, and adopted by the Court, that although the Court will construe a deed according to the general intention, scope, and meaning which may be found on considering the whole of it, yet that the Court will never construe

<sup>1</sup> Winch, 46.

a grant directly contrary to its terms, and make it a grant of a part only, when in terms it was a grant of the whole. That argument appears to have been adopted by the Court,<sup>1</sup> the statement of the case in *Viner* being, "that no construction shall be made contrary to the express words of the grant."<sup>2</sup> There was a similar case of Lord Lisle, which I will mention in a moment, in which the same question seems to have occurred. But I do not think it is necessary to trouble your Lordships with any lengthened observations with respect to the application of the general rule to the present case; for this reason,—if it is clear, upon the face of that deed, that the property became subject in equity to the trusts, in that case the effect, as is \* 852 agreed upon the present occasion, would be precisely the same, as far as entitling the *cestui que trust* under the deed of settlement to the benefit of the property is concerned, as if the legal estate had itself passed.

I must confess that I do not think any arguments at the bar were urged tending to create a doubt, but that a Court of Equity would have enforced, if necessary, the conveyance of this property by Sir George Hill, because it would be here perfectly absurd to argue that, upon the face of the deed, any doubt can be entertained that Sir George Hill was the person intended to convey. There is the previous recital of the interest of the different conveying parties, and a recital of the conveyance by Sir G. Fitzgerald Hill to the use of Sir George Hill. There is no recital whatever of any grant to, or any interest in, Mr. Rea. There can, there-

<sup>1</sup> *Winch*, 57, where the judgment is thus stated: "Now the case of the Bishop of Gloucester and Wood was adjudged, Hobart and Winch being only present: and first it was resolved by them, that when the Bishop let parcel, as twenty acres for life, and after he lets the manor itself to another rendering rent, in this case the rent issues out of the entire manor, for if in debt for the rent, the lessor do declare upon a demise of the manor omitting the reversion of this parcel, the declaration is evil; and upon *non demisit* pleaded, it shall be found against him. Secondly, this they held, that the heriot reserved shall go with the reversion; and if this do not go with the reversion to the lessee of the manor, yet the plaintiff shall not have the heriot; and then, though the defendant had not good title to the heriot, yet if the property of the heriot do not appertain to the plaintiff, he shall not have a trover and conversion, for the defendant had the first possession: and judgment was commanded to be entered for the defendant, if no other cause was showed before next Thursday."

[It is not afterwards mentioned.]

<sup>2</sup> 14 *Vin. Grants* (H. 13), 3.



fore, be no doubt, if it should be found that the effect of the Irish Registration Act is to take this case out of the ordinary rule, under which, if equity is equal to equity, the legal title must prevail, it must subject Mr. Mill, the plaintiff, to the trusts of the deed ; and it becomes perfectly immaterial whether the property passed at law, or not. And therefore, perhaps your Lordships would think it unnecessary to indicate any opinion upon that point. No doubt can be entertained that the Lord Chancellor was correct in holding that, in point of equity, Sir George Hill made a settlement of this property, the property of his uncle ; that he was the grantor, and was bound by the settlement.

It therefore appears that here is an equitable settlement of that property. Subsequently to the equitable settlement, here is what may be called an equitable lease of the property. If all those renewed leases were grafts upon the old leases, of which,  
 \* 853 I take it, since the cases in *Ambler*,<sup>1</sup> \* and probably before, not the slightest doubt can arise, it will not be necessary to distinguish between the new leases and the old ; but you will be inclined to hold that both were subject to the same equities. It would be attended with great evil and mischief if individuals who take a limited interest in property, subject to certain trusts, could change the nature of that property by any contrivance, or by any arrangement, and then take the new property for their own benefit, discharged from the trusts which attached to the old. The same rules must in such cases be applicable to both.

Now, my Lords, there being an equitable settlement of this property, but a subsequent grant inconsistent with that equitable settlement, the question arises, — is that legal conveyance, subsequently made, bound by the equitable settlement, or not ? That depends entirely upon the Irish Registration Act, which, as you are aware, differs in some respects from the English Registration Act. The Irish Registration Act, in the first two or three sections, provides generally that deeds may be registered, not rendering it compulsory in any other sense than this, — that it leaves parties, who have not registered, exposed to the great peril of having their grants disappointed and defeated by subsequent grants, though those claiming under subsequent grants have taken in contravention or fraud, provided they have registered those grants.

<sup>1</sup> *Morecock v. Dickens*, *Ambler*, 678 ; *Rawe v. Chichester*, *Ambler*, 715.

Then the 4th section provides — (his Lordship read it, see ante p. 831 n.).

My Lords, up to the time of Lord Redesdale it does not appear that there was any judicial construction of that clause which was considered as determining the question. But, in *Bushell v. Bushell*,<sup>1</sup> Lord Redesdale took time to consider the question, and delivered an elaborate judgment upon the subject, marked by all the intelligence and \* soundness of law for which that learned \* 854 Judge was conspicuous, and he came to the conclusion that upon the true construction of this section, differing in its language from the section in the English Act, the equity in the grant which was registered would prevail, as an equity, against any subsequent grant, by the same party, inconsistent with it.

My Lords, notwithstanding that learned and elaborate and most distinct judgment, doubts still appear to have been entertained, until at last the question came before the present Lord Chancellor of England, at that time the Lord Chancellor of Ireland, in the case of *Drew v. Lord Norbury*.<sup>2</sup> There the question arose again; the Lord Chancellor appeared to entertain some doubt at first upon it, and therefore had the case argued before him, and called to his assistance the Chief Justice of the Queen's Bench and Baron Pennefather. It was learnedly and ably argued, and the two learned Judges delivered a most able and learned opinion, confirming the opinion of Lord Redesdale, and the Lord Chancellor confirmed and adopted their opinion.

It is now fifty years since Lord Redesdale came to that decision, and between six and seven years since the present Lord Chancellor, then holding the seals of Ireland, confirmed and adopted it. If the rules of law applicable to the settlement of property, which have been solemnly decided and acted upon during a period of fifty years, which have governed professional men in that country in advising and in arranging their clients' interests in respect of property, are to be called in question, and if at the end of that time that which might have been at one time doubtful, but has long since been settled, is to be reopened and reconsidered, and an alteration takes place, I confess it appears to me that the Courts would become rather a snare \* than a protection. \* 855 The opinion of Lord Redesdale was in itself entitled to

<sup>1</sup> 1 Schoales & Lefroy, 90.

<sup>2</sup> 9 Irish Eq. 171, 183 et seq.

great weight as an authority, and it is entitled to still greater weight when the length of time is considered during which I must suppose it to have been acquiesced in, and to have been acted upon in regulating the disposition of property ; and I think your Lordships would be very slow indeed to do any thing which would bring that judgment into doubt, more particularly when you consider that it has come under the solemn revision of the present Lord Chancellor, assisted by the two learned Judges I have mentioned, and has been deliberately confirmed. I should therefore submit to your Lordships, that that should be taken as settled law, not subject to any doubt or question, and not now again open to argument ; and that under that Act it should be deemed that, according to the true construction, an equity which is duly registered is entitled to bind property which may be the subject of grants made at a time subsequent to such registration. My Lords, entertaining that opinion, I should most respectfully recommend your Lordships to acquiesce in and to confirm the ruling which I have before stated.

The next point is with regard to the memorial. Now the memorial, I have stated to your Lordships, in referring to the deed, states it to be a deed by which Mr. Rea and Sir George Hill both granted, whereas, according to the letter of the deed, Mr. Rea granted, and not Sir George Hill, either jointly or severally.

In order to consider the effect of an error of that sort, it is necessary to refer to the Registration Act to see what it requires the memorial to contain : that will be found in the 7th section. The memorial is required to contain the dates, the names of the parties, and the parcels, in other words, the description of the

lands which are the subject of the deed, according to the \* 856 terms in which those lands are \* described in the deed professed to be registered. In this case the parties have added something more, and it is said that in that something they have erred and misstated. Well, but if they have stated all that the statute requires, supposing they have stated something more, if that which they have added unnecessarily, that surplusage, had no tendency to mislead or to obscure, nay, rather tended to induce additional caution, it certainly would be a very strong thing to hold that, by the additional matter not required by the Act of Parliament, and which additional matter had no tendency to defeat or to vary the effect of that which is stated according to the

requisition of the Act of Parliament, the whole deed was invalidated. I do not see any ground for such a proposition.

Then it was further said, that in truth the memorial only stated the legal effect of the deed; for on looking at the legal effect of the deed, Mr. Rea and Sir George Hill did grant. Without going into that, it appears to me, that inasmuch as they gave all which the statute required, and if they further stated that which it would be most important for an individual to know, and which would put him upon greater caution, induce a strong necessity for inquiry, and in no respect have a tendency to injure, I think it had no injurious effect. Of course, if an individual was bargaining with Sir George Hill for the purchase of his estate, and found upon the register what professed to be a memorial of a grant by Sir George Hill of that property, that would stimulate inquiry much more than if it stated that Sir George Hill was a party to a deed with other persons, by which deed something was done, but without showing that these persons had been dealing with and affecting that property. That would not be half as stringent as when it said expressly that Sir George Hill himself had granted, as undoubtedly he had granted, the estate equitably, subject to the trusts of the settlement. As it \* appears to me, no mischief arose from that mistake in the \* 857 memorial. I cannot think that it ought injuriously to affect the rights of the parties. I consider, therefore, that as far as concerns the settlement of 1831, supposing that deed alone required to be registered, it was sufficiently registered to satisfy the terms of the Act of Parliament.

But then, my Lords, it is said that it ought not to have the effect which the interests of the plaintiffs below required it should have, namely, to give priority; because it is said that the settlement of 1830, the root of the title, was not registered. That it was not registered was admitted on all hands. Your Lordships will bear in mind that the settlement of 1830, by Sir G. Fitzgerald Hill, was made in favour of his nephew. I attended during the argument to see upon what principle, looking at the circumstances of this case, that deed was required to be registered. I did not collect, undoubtedly from the arguments at the bar, any principle. It was stated that it was necessary because it was called the root of the title, and it was said that the derivative conveyance of 1831 had not the effect of registering that deed, which is correct

enough; but whether it was necessary that that deed should be registered at all is another matter, and I repeat I have not yet heard, nor been able myself to discover any principle upon which that deed is required to be registered. The deeds which the statute requires to be registered are those deeds the interests granted under which are affected by some other grant. A deed which is altogether unaffected by any thing else does not appear to me to fall within the principle which I collect from the statute. The settlement by Sir G. Fitzgerald Hill is correct enough in itself; he granted to Sir George Hill. What is it that this case requires? Why, that what Sir George Hill did with the estate, or the fact that he did something with the estate, should be put upon \* 858 record, so that anybody who \* may propose to deal with him may, by searching that record, ascertain that there are deeds in existence which may, by possibility, affect the rights of the parties. But in the present case, what would it matter to Mr. Mill whether the settlement of 1830 was registered or not? The present appellant claims under Sir George Hill, and whether Sir George Hill claims under the settlement of 1830, or whether he took as heir at law of his uncle, is perfectly immaterial. The thing which affects the interests of Mr. Mill is, that Sir George Hill had charged this estate, and having so done, sought to sell that interest which he had so charged, without giving notice of the charge. The deed of 1830 is not essential for that purpose, and I repeat, I have not been able to discover any principle which requires it to be registered.

But it was argued as matter of authority, and certain cases were referred to as tending to show that it had been determined as necessary that deeds in the position with regard to the transaction in which the settlement of 1830 stands were required to be registered. I have searched through the cases, but it does not appear to me that any one of them supports that doctrine, or creates any necessity for the registration of the deed. I will call your Lordships' attention to those cases, and state why they appear to me not at all to warrant the conclusion.

My Lords, there is the case of *Warburton v. Loveland*,<sup>1</sup>—an extremely important case, which came before this House. Lord Tenterden presided at the time of the argument. The question arose, whether a lease, which had been granted by a person of the

<sup>1</sup> 2 Dow & Clark, 480.

name of Warburton, was a lease which would prevail against a settlement to which Mr. Warburton had been a party prior to his marriage. Mr. Warburton married a lady who was entitled, with her \* father, to an interest in the property in \* 859 question ; and the lady being about to marry Mr. Warburton, the father, the daughter, and the intended husband joined in the settlement of that property. That deed was not registered, and the husband afterwards, upon the death of the father, being in possession, as he was entitled to be under the settlement, assumed to be the owner in right of his wife, and claimed to be entitled to demise that which he would have been entitled to do if there had been no such settlement ; and accordingly he did grant a lease. That lease, which was registered, was afterwards assigned, and after the death of the husband, the wife sought to recover the property for her own benefit, according to the terms of the settlement. The question arose, whether the registered lease, by the husband, was entitled to prevail over the settlement, that settlement not being registered. Lord Chief Justice Tindal delivered the opinions of the twelve Judges upon certain questions put by the House to them, — those questions being, first of all, which title ought to be preferred, the title under the settlement, or the title under the lease ; and secondly, whether the question would be affected by the circumstance of the assignment, under which the party then claimed to be entitled, not being registered. The answers to those questions were, as to the first, that the title of the assignee under the lease ought to be preferred, because the original settlement had not been registered. There was, therefore, an entire concealment from the assignee of the marriage settlement, which had the effect of depriving the husband of that property, the interest in and right to which he would have acquired by his marriage, supposing he had not affected that right to the property and interest in it by that marriage settlement. He was in possession with the apparent right, and he exercised the apparent right in fraud of the settlement. But then \* those with whom he dealt had a right to expect that, if \* 860 the husband had done any thing which precluded him from being entitled to make the grant, which he professed to make, that ought to have been put upon record, and they were of course deceived by the absence of any registration of that prior settlement. They found the man in apparent possession of the title,

and they took his grant. Then, with regard to the registration of the assignment, it was held to be immaterial. That case, except upon the general principles, which hardly can come in contest, does not appear to me to assist the appellant in the present case.

The next case cited was the case of *Jack v. Armstrong*.<sup>1</sup> That case is of this description : a person of the name of Young demised to Renwick the elder and Renwick the younger for their lives. Renwick the elder executed a deed, by which he declared that he was entitled to no beneficial interest under the lease ; that Renwick the younger was entitled to it ; and he accordingly conveyed the lease to Renwick the younger. This conveyance was not registered. Renwick the younger died ; and after his death, Renwick the elder, concealing the conveyance which he had made, and assuming himself to be the surviving joint tenant of the lease which had been granted to the two, assigned that lease to Macartney. It must be observed that here Renwick the elder assigned to Macartney a lease previously assigned to Renwick the younger. Macartney did not register the assignment to him, and for want of that registration he was held to take nothing. Macartney assigned to Armstrong, who did register. It was held that Macartney took nothing by his unregistered assignment, and therefore conveyed nothing to Armstrong ; so that the lessor of the plaintiff, the heir at law of Renwick the younger, was held to be entitled to recover. It will be observed that there a question arose

\* 861 under the 5th section \* of the Act. Macartney was the grantee in the fraudulent grant by Renwick the elder ; it was honest as respected the grantee, but fraudulent as respected the grantor. To entitle a grantee in a fraudulent grant to prevail as against the owner of a previous *bond fide* grant, such grant must be registered ; because, by the 5th section, it says, that where two deeds are registered, the prior deed, whatever it may be, shall prevail over the latter, always understanding, of course, a case where there is notice of that prior deed. It therefore was held that Macartney's deed was the deed which conflicted with the conveyance to Renwick the younger. That conveyance was a perfectly good and valid conveyance to vest the whole term in Renwick the younger, and nothing could defeat that interest except a right under some distinct statute. Well, then, the statute says, in order to protect persons from being prejudiced

<sup>1</sup> 1 Hudson & Brooke, 727, Appendix I.

by fraudulent grants, that the party shall register, and where the party who had that fraudulent grant made to him did not register, it was held that in that case he took nothing. It will be observed that this conveyance from Renwick senior to Renwick junior, which Renwick the elder afterwards concealed, was not registered; but although that was not registered, yet, as the party who claimed in priority — that is, Macartney — had not registered, the two deeds stood upon equal terms, neither of them being registered; and the circumstance of a subsequent grant being registered, in which the grant to Macartney was mentioned, was held not to have the effect of placing the assignments of Macartney in the position of a registered deed. But I do not therefore see that any inference whatever can be collected from that case to lead to the conclusion that the deed of settlement of 1830, against which there is no conflicting deed, ought to be registered. That deed stands, as it appears to me, perfectly independent \* of the whole transaction, and \* 862 does not fall within the terms of the Act of Parliament.

Then there is another case of *Honeycomb v. Waldron*.<sup>1</sup> In that case, there was the grant of a lease by Lord Grandison, which parties contested. A question arose as to the Registration Act, and it was held that, for want of a prior deed being registered, the party took nothing by the registration of the subsequent assignment of it; but it is not stated in that case how the question arose, and the only way in which it can be surmised that the question arose to make it applicable is this, — that Lord Grandison granted a lease, which was not registered; that he afterwards granted a second lease, contrary to what he ought to have done, during the existence of the first lease; that that second lease was not registered, but was assigned, and that the assignee registered the assignment, but did not register the original lease. Therefore I presume it was a contest between the persons claiming under the first lease by Lord Grandison, and the persons claiming under the second lease by Lord Grandison; and that the individuals, whoever they were, had omitted to register that second lease, which they desired should succeed and prevail over the first lease; which brings us very much to the same point as the case of *Jack v. Armstrong*, where the party could claim no benefit under the Registration Act, because he had not registered that deed, which was a fraudulent and conflicting deed, with one which the grantor had

<sup>1</sup> 2 Strange, 1064.



previously executed, and by which he had conveyed away the interest, so as to leave him nothing to pass by the second deed. That case is often referred to in the text-books, but it is stated in the very general terms I have mentioned, and no explanation is given ; but the case is perfectly intelligible upon the assumption that Lord Grandison had granted two leases.

\* 863     \* Against those cases was cited the case of *Stuart v. Ferguson*,<sup>1</sup> and it was much relied upon, and I own I think justly, for it appears to me that that case does apply to the present. In that case, a person of the name of Alexander Ledlie was the owner of a mill, and he was in partnership in the business there carried on with Ferguson. It appears that the premises where the business of the mill was carried on were vested in Stuart, but that he held it for the purpose of the partnership, and that therefore, during the partnership between Ledlie and Ferguson, he was trustee for Ledlie and Ferguson. They afterwards took into partnership a Mr. Thomas Ledlie ; then Thomas Ledlie became entitled to one third, Ferguson entitled to one third, and Alexander Ledlie to one third. Alexander Ledlie assigned to Thomas Ledlie the one third to which he was entitled, but the deed was not registered. Thomas Ledlie afterwards settled that one third upon his marriage : that settlement was registered. There it will be observed that Thomas Ledlie takes by virtue of the grant from Alexander Ledlie, and then settles the third upon his marriage, and registers his deed. Ferguson, the other partner, retired, and he being a large creditor of the partnership, Alexander and Thomas Ledlie, after the date of the marriage settlement, which had been registered, mortgaged their interest in the mill to Ferguson. Thomas Ledlie died, and Alexander Ledlie then assumed to be the surviving joint tenant, and released the equity of redemption to Ferguson. When Thomas Ledlie died, those who claimed under the settlement filed their bill, in order to constitute Ferguson trustee of that one third which Alexander Ledlie had assigned to Thomas Ledlie, and which Thomas Ledlie had settled upon his marriage, by a deed

\* 864     which had been registered. It was \* there objected, that they were not entitled to the protection of the Registration Act, by reason that the original assignment from Alexander Ledlie to Thomas Ledlie was not registered ; but that was held to be immaterial, and, I apprehend, justly so.

<sup>1</sup> *Hayes, Irish Exch. Cases, 452.*

Now that is precisely parallel to this case. Here Sir G. Fitzgerald Hill conveys the property to trustees for the benefit of Sir George Hill. That is analogous to the conveyance by Alexander Ledlie to Thomas Ledlie. Here Sir George Hill settles it upon his intended marriage. In that case Thomas Ledlie assigns his property so settled. After the settlement in this case Sir George Hill sells the property to the plaintiff Mill ; the cases, therefore, are parallel. In that case, those who claimed under the settlement came forward and insisted that the mortgage made by Thomas Ledlie after the settlement ought to be avoided. In this case, those who were entitled under the deed come and say that the conveyance made by Sir George Hill to Mr. Mill ought to be avoided, or ought to be made subject to the terms of the settlement. In this case, it is objected that the conveyance by Sir G. Fitzgerald Hill to trustees for the benefit of Sir George Hill was not registered ; in that case, it was objected that Alexander Ledlie's assignment to Thomas Ledlie was not registered. The two cases appear to me to be perfectly parallel. In that case the objection was held not to be valid, and it was not sustained, and the decree was made according to the prayer of the bill.

When, therefore, this case is looked at in point of principle, it is impossible to find any ground or reason why the deed of 1880 should have been registered ; it could have conveyed no information material to the present case. If it is found that Sir George Hill was entitled, — and the question is whether Sir George Hill, being so entitled, has \* charged the property to which \* 865 he is entitled, — it cannot be material who conveyed it to Sir George Hill. To what extent, if this rule were applied, would it be required to go ? If the conveyance by Sir G. Fitzgerald Hill is to be registered, why should not the conveyance to him be registered ; and so on, proceeding retrospectively, where is it to end ? Why is the deed immediately conveying this to Sir George Hill to be registered, any more than the preceding deed to his grantor ? None of these deeds would give any information. If, indeed, this was a case in which somebody was claiming under the grant made by Sir G. Fitzgerald Hill contrary to his settlement upon Sir George Hill, and the question arose which of the two grants should prevail, then undoubtedly the non-registration of that settlement would defeat those who claimed under it, and who by neglect to register came within the Act ; but this being simply the case of a

grant by Sir George Hill conflicting with the deed of settlement of Sir George Hill, and not with the grant made by Sir G. Fitzgerald Hill, there does not appear to me the slightest reason why the parties should be under any obligation to incur the expense of registering that grant. I repeat that omitting to do so placed them at the peril of a fraudulent grant by Sir G. Fitzgerald Hill; none such, however, has taken place, and it can have no influence whatever in deciding upon the claims of priority between those claiming under the settlement by Sir George Hill, and those likewise claiming under Sir George Hill in virtue of another grant.

It seems to me, therefore, that the deed of settlement of 1831 has been well registered, and that, according to the true construction of the settlement under the 4th section of the Registration Act, it is entitled to prevail as a good equitable settlement of this property; and that leases being granted in the manner I \* 866 have before adverted to, renders \* them subject to that settlement; and the decree, therefore, which declares that the appellant held this land as trustee, appears to me to be right.

With regard to Mr. Lecky's lease, Sir G. Fitzgerald Hill held, as I before said, as tenant from year to year under Mr. Lecky,—there are statements and surmises, and so on, of there being an agreement for a lease, but there is no evidence at all of that; therefore he must be taken as holding under a tenancy from year to year under Mr. Lecky. It is distinguishable from the case of Sir Robert Fergusson, but how? Is there any difference in the law with respect to the length of the term? I apprehend none. Sir G. Fitzgerald Hill is the holder from year to year; he conveys all his interest in that term to Sir George Hill, who in his turn conveys it to trustees; and having so done, his term became bound by the trusts of that settlement. He accepts a new lease from Mr. Lecky. What is the effect of that? Why it is, by operation of law, a surrender of the old one. But is not the law clear, that if a man has a limited interest in a term, and he surrenders that interest and takes a new and an extended term, he cannot apply that in avoidance of any settlement he has previously made? The case, therefore, is simply this, that an individual with so short a term as a holding from year to year, probably capable of being determined, in the absence of any evidence of an agreement for an extended term, holding, I say, a term from year to year, subject to the trusts of the settlement, surrenders that term and takes an

extended term, it is clear that it is a graft on the term from year to year ; he has surrendered it by operation of law. It comes within the principle of every case which has been decided, and it does not appear to me that that case is distinguishable from the other.

The question therefore is, as the decree directs and \* declares that this unfortunate gentleman shall stand as a \* 867 trustee for the parties interested under the settlement, what relief is he to have ? Unfortunate he is, there being nothing whatever in the case which tends to impeach his conduct, but rather to show that he is that which he states himself to be, a *bond fide* purchaser for valuable consideration without notice. He has had the misfortune to deal with an individual who has deceived him, and then where two persons are placed in the situation of being deceived by a third party, the law has given protection to that one who takes the benefit of the Act of Parliament by registering his deeds. The settlement of 1831 was registered, and unfortunately, this gentleman not having been induced to search the register, has sustained a loss in this case.

It now becomes material to look at the terms of the decree. I have mentioned that Sir George Hill died in 1845. The decree directs the appellant to be charged with the property from 1st November, 1841. I do not understand why that date is taken. I dare say he entered into possession in 1841. But then Sir George Hill was entitled to the property during his life, and though his grant would not pass any greater interest than he had, yet during the term of his life those who held under him were entitled to all the benefit he was himself entitled to. I think there must be some mistake in fixing that date ; I have looked through the argument, having taken a pretty full note of it, and I do not find any reason suggested for charging the appellant to the extent I have mentioned. It seems to me that from the time of Sir George Hill's death, Mr. Mill held as trustee for the infant plaintiff, and therefore he would be bound to follow out that which attached to the character of trustee, and to use the property of which he was trustee beneficially for the *cestui que trust* ; and if, instead of letting the property, he was occupying it, he must be charged with \* a reasonable occupation-rent which might \* 868 be obtained for it. The decree proceeds thus : " And the Court doth declare that the said defendant is chargeable (to the

extent of the said sum of 409*l.*, with interest, as aforesaid) with such occupation-rent from the 1st day of November, 1841, up to the 15th day of December, 1845, being the day of the death of said Sir George Hill." Now this, I apprehend, does not mean that the 15th December, 1845, is the first day from which he is to be charged, but it means that that is the last day up to which he is to be charged, that is, the day at which his interest under Sir George Hill ceased, and upon which the interest of the infant plaintiff began. It seems to me, therefore, that there is some mistake here, and that, in point of law, he is chargeable with an occupation-rent from the time when the infant plaintiff became entitled to possession, which was not before the death of his father, Sir George Hill. From that time Mr. Mill is chargeable with an occupation-rent. As at present advised, I cannot but consider that there is some mistake here which must be corrected.

Then the next point is, that Mr. Mill complains that the decree gives him no indemnity. Now it was remarked by the learned counsel for the respondent, that that had not been asked below, and it was said that it was introduced here for the purpose of saving costs by getting an alteration in the decree. I conceive that he is clearly entitled to an indemnity. I have always acted upon the principle that individuals ought not to be encouraged to forbear from asking in the Court below for that which they may be entitled to, and keeping it back with the view of supporting an appeal afterwards. But there is no reason to suppose that any thing of that sort took place upon the present occasion. It appears to me that the appellant is entitled to an indemnity.

\*869 \*I find nothing to bar him from that, and I think the decree must be amended in that respect.

Then arises the important question with regard to the improvements. Now certainly this gentleman stands in a situation entitled to as much benefit as any person standing in the position of a constructive trustee is entitled to. Without the parade of going through a number of cases, it will be found that there are several cases on this subject referred to in *Hill on Trustees*.<sup>1</sup> I have gone through all those cases, from the case of *The York Buildings Company v. Mackenzie*,<sup>2</sup> in which this House, setting aside a sale which had taken place, directed the individual to be allowed upon a fair account the improvements he had made in the per-

<sup>1</sup> Page 558.

<sup>2</sup> 8 Brown, P. C. 42.

manent value; and I do not find any case contrary to that, except where the trustee had been guilty of fraud. It seems to me, therefore, that there should be an inquiry before the Master as to any permanent improvement in the pecuniary value of the estate. I do not apprehend that the appellant is entitled to be reimbursed at the expense of the infant for any improvements which he may have adopted as a matter of taste, or as a matter of personal convenience. But where he has added to the permanent value of the estate, it appears to me that he is entitled to a fair allowance. At the same time, there are many charges in the nature of waste, and of course the inquiry must take place on the subject of any deterioration, which must be set off against any thing that he may be found entitled to in respect of improvements. He is chargeable with an occupation-rent during the time he held the property, and I think he is entitled to a reference to the Master to ascertain whether he has made permanent improvements in the value of the estate. I use the word "value," in order to point out that it is not a fanciful or tasteful expenditure, which \* 870 may have been incurred for the mere purpose of personal enjoyment, but expenditure with a view to permanent improvement.

The only remaining question is the question of costs. Now, I own I cannot see any ground for fixing this gentleman with costs. He appears to have been very unfortunate, and I think the question which he has raised in this case is perfectly fair, under all the circumstances of the case, and I do not see any instance of misconduct on his part. I think the decree must be for the respondent, with variations, and without costs on either side.

*Mr. Terrell.* — I suppose, my Lord, that the variations from the original decree will be made the subject of a declaration by this House, and with that declaration the case will go back to the Court below?

LORD TUBRO. — Yes.

The following order was afterwards made: —

"It is ordered and adjudged, that the decree of 5th May, 1848, be affirmed, with the variations hereinafter mentioned: by omitting the following clause: 'And the Court doth declare that the said defendant is chargeable to the extent of 409*l.* with interest as aforesaid, with such occupation-rent, from the 1st day of November, 1841, up to the 15th day of December, 1845, being the day of the

death of the said Sir George Hill, deducting therefrom the head-rents and all other lawful outgoings and allowances, according as the same are chargeable up to the same period':

"And by inserting a reference to the Master to inquire and ascertain what improvements of a permanent nature in the portions of the house and demesne lands of Brookhall, held under Sir Robert Alexander Fergusson and Mr. Lecky, have been made by James Mill, and whether and to what extent the said portions have been increased in value by such improvements; and also whether

and to what extent the said portions have been deteriorated in value by  
 \* 871 acts of waste committed by James Mill; and by inserting a declaration \*that James Mill is entitled to have credit for such sum as shall be equal to the excess of the increase in value beyond the deterioration in value by waste so ascertained as aforesaid, or (as the case may be) that James Mill is chargeable with such sum as shall be equal to the excess of the deterioration in value beyond the increase in value so ascertained as aforesaid :

"And by inserting a reference to the said Master to approve of a proper indemnity to James Mill, his heirs, &c. against any claim or demand which may be made against them under the covenants contained in the indenture of lease of the 18th January, 1842, in the decree mentioned; and by omitting the order and direction in the decree contained for assigning the hereditaments in the decree ordered to be assigned, and for the delivery up of documents therein ordered to be delivered up by James Mill; and by inserting an order that within one calendar month after the Master shall have certified that such indemnity so approved by the Master as aforesaid has been given, and upon payment of what (if any thing) may be coming due to James Mill in respect of the sum of 409*l.* and interest, and in respect of such excess of increase in value beyond deterioration in value as aforesaid, after taking the accounts, James Mill do assign the said portions held under Sir Robert Alexander Fergusson and Mr. Lecky, with the appurtenances, to Kyle and McCausland, for the remainder of the respective terms under which he now holds the same, and to deliver up possession of the same to them, and do deliver to them the several leases and agreements for leases and other writings and muniments of title relating to the said portions, which were delivered up to him by Sir George Hill, or which have otherwise come to his hands, and the leases and renewals of leases obtained by James Mill in his own name and to his own use : and, with these variations in the decree, it is further ordered, that the cause be remitted back to the Court of Chancery in Ireland, to do therein as shall be just and consistent with these variations and this judgment."—Lords' Journals, 30th June, 1852.

## \* MIDLAND GREAT WESTERN RAILWAY v. LEECH. \*872

1852. Dec. 7, 9.

The INCORPORATED PROPRIETORS of the MID- } *Plaintiffs in error.*  
 LAND GREAT WESTERN RAILWAY of Ireland, }  
 JOSEPH LEECH, . . . . . *Defendant in error.*

*Railway Company Amalgamation.*

A company for making a railway from Dublin to Mullingar was incorporated by an Act of Parliament passed in July, 1845 (8 & 9 Vict. c. 119), under the name of "The Midland Great Western Railway Company of Ireland." Some of its directors provisionally registered another company for making a railway from Mullingar to Galway, to be called "The Galway and Mullingar Junction Railway Company." Three months afterwards this name was altered at the Registration Office to "The Midland Great Western Railway Company of Ireland (extension from Mullingar to Galway)." Most of the directors of the two companies were the same. L. applied for and received scrip certificates in the extension company, and paid deposits thereon, and received receipts headed with the altered name, and signed the shareholders' agreement and parliamentary contract. The Midland Great Western presented, in its own name and under its corporate seal, a petition to Parliament for an Act to make a railway from Mullingar to Galway, undertaking, at its own expense, to make the railway. The Act which was passed upon this petition, in July, 1846 (9 & 10 Vict. c. 224), only gave authority to make the railway from Mullingar to Athlone, or but a part of the distance. The directors had power under the Act to raise the necessary sums "by contributions among themselves or by the admission of other parties." The additional capital required for the extension was directed to form "part of the general and original capital of the company"; and the provisions of the recited Act (that of 1845) were to extend to and be read with the new Act. The expression "The Company," in the new Act, was declared to mean the Midland Great Western Company. In September, 1846, at a meeting of the directors of the Midland Great Western Company, a resolution was passed stating on what terms the holders of the extension scrip should be entitled to certificates in the joint company, and another resolution approving \* of and confirming those terms. At \* 873 that meeting the seal of the Midland Great Western Company was affixed to the shareholders' book, which, however, did not then contain the names of the shareholders in the extension line. The latter were added in March, 1847, when one of them, that of the defendant, was inserted. Three calls were made; the first was dated previous to the insertion of the extension subscribers in the shareholders' book, the two others after that insertion. An action was brought for these calls:—

*Held*, that the Act did not amalgamate the two companies; and that even if the directors possessed a power of amalgamation, the resolution of September,



1846, was not an exercise of that power so as to render the defendant liable to an action for any one of the calls at the suit of the Midland Great Western Company.

THIS was a writ of error from the Court of Exchequer Chamber, on a judgment in an action of debt for calls brought by the plaintiffs, as incorporated members of this company, to recover the sum of 1500*l.*, the amount of three calls of 2*l.* 10*s.* each, on 200 shares of 25*l.* each, of which the defendant was alleged to be the holder. The defendant pleaded, first, never indebted; and secondly, that he was not a holder of shares in the plaintiffs' company. The plaintiffs joined issue on these pleas. The cause was tried at the Spring Assizes at Kingston, in 1849, before Baron Parke and a special jury. A bill of exceptions was tendered to the learned Judge's direction, and the facts, as set forth in the bill of exceptions, were these:—

On the 21st of July, 1845, the plaintiffs in error obtained an Act (8 & 9 Vict. c. 119), incorporating them as a company, under the title of "The Midland Great Western Railway of Ireland," for the purpose of making a railway from Dublin to Mullingar and Longford, with power to purchase and hold the Royal Canal. The capital of this company was to be one million, divided into 20,000 shares of 50*l.* each. On the 31st of July, two of \* 874 the directors registered \* themselves provisionally, under the Joint Stock Companies' Registration Act, as the promoters of a proposed company, to be called "The Galway and Mullingar Junction Railway Company"; and they obtained a certificate of provisional registration thereof. This name was in September changed at the Registration Office to that of "The Midland Great Western Railway Company of Ireland (Extension from Mullingar to Galway)."

In May, 1845, a company had been projected, to be called "The Galway and Belfast Junction Railway Company," and had been provisionally registered under that title. The defendant and his partners were solicitors to this projected company. It was subsequently determined not to proceed with this project; and Mr. Blake, the deputy chairman, opened a negotiation with the plaintiffs' company, "The Midland Great Western," on the subject of an amalgamation. Most of the directors of the one company were directors of the other. A meeting of the provisional committee of the projected "Galway and Belfast Junction Railway Company"

took place on the 18th of August, 1845, when the following resolution was passed: "That, with a view to promote the interests of this company, and considering that a railroad communication between Galway and Belfast may be less expensively and more advantageously obtained by means of a deviation from the line originally contemplated, and of a junction with the Midland Great Western Railway, and Royal Canal Company, now proposing to extend their line from Mullingar to Galway, it is hereby resolved, that we do consent to adopt such line or lines of railway as shall be approved by M. J. Blake, Esq., our deputy chairman, and as will afford direct communication, or sufficient accommodation between the towns of Galway, Tuam, Ballinasloe, Athlone, and Mullingar; and we do hereby agree to unite \* with the \*875 said Great Western Company; and that this resolution, when agreed to on the part of both companies, be submitted to counsel, for the purpose of being rendered binding in law, and effectually uniting the companies in such manner as shall preserve all the rights and privileges to which this company has become entitled, by reason of provisional registration or otherwise, and as shall best insure the interests of both."

On the 4th of September, in that year, the directors of the Midland Great Western Railway Company resolved "that, under the peculiar circumstances of the case, it appears desirable that the Galway and Belfast Junction Company should merge in the Extension from Mullingar to Galway on the terms above stated," and that Mr. Blake's proposal be agreed to. On the following 17th September, an advertisement was published, headed, "Galway and Belfast Junction Railway," and informing the shareholders of that company that "an arrangement has been made with the Midland Great Western Railway Company of Ireland, in accordance with which, that portion of the Galway and Belfast line which is between Galway and Longford is to be surrendered to the Midland Great Western Railway Company, on payment of certain expenses which have been incurred." The shareholders of the Galway and Belfast Company were informed what options they were to have as to receiving the shares, and how they were to intimate their intentions, and were told that "shareholders who do not avail themselves of the option thus secured to them on or before the 1st of October next will be considered as declining the same." On the 2d of October, 1845,

the defendant wrote in the name of his firm to the solicitor of the Midland Great Western, asking for the shareholders in the Belfast and Galway for 4000 shares in the Extension Company; \* 876 and a letter of allotment of 170 shares was sent \* to him, in which the name was thus given: "Direct Railway from Dublin to Galway,—Midland Great Western Railway of Ireland (Extension from Mullingar to Galway)"; and it was said, "the above extension will be amalgamated with the existing incorporated company." Thirty other shares were afterwards allotted to the defendant, and he paid the deposits on all. The form of the receipt in each case was, "Received on account of the Midland Great Western Railway Company of Ireland." On the 17th of January, 1846, the defendant signed a letter, written in the name of his firm, and addressed to the secretary of the Midland Great Western Railway Company, at the company's offices in Dublin, in which he enclosed receipts for deposits on shares, and asked for scrip certificates in return. The list of names was headed "Midland Great Western Railway of Ireland, Extension from Mullingar to Galway." One of the names in the list was his own, which was put down for 200 shares. The defendant thereupon received certificates for 200 shares. The certificates were headed in the same form as the list.

On the 15th of January, 1846, the defendant signed a shareholder's agreement, which had been prepared on the 22d of October, 1845, for the shareholders in the extension line, and which contained among others the following passages: "First. That they, the several persons parties hereto, shall constitute, and they do hereby form themselves into a company or association, for the purpose of making and maintaining the said railway as aforesaid, by the name and style of 'The Midland Great Western Railway of Ireland, Extension from Mullingar to Galway,' or by such other name or style as may at any time hereafter be adopted by the directors of the said company, or under the authority of Parliament respectively."

\* 877 \* "Second. That the capital of the said company shall be a sum of 800,000*l.* sterling, divided into 32,000 shares of 25*l.* each."

"Fourth. That the said directors, or any board or meeting thereof, constituted according to the provisions herein contained, shall have full power in their absolute discretion to carry into

effect the said undertaking, \* \* \* \* and to adopt and carry into execution, and from time to time to take or vary any measures whatsoever, and of what kind soever, which the said directors in their judgment may consider necessary or expedient for obtaining an Act or Acts of Parliament for authorising the construction of the said intended railway, or any part thereof, and for establishing and regulating the said undertaking, and incorporating the subscribers thereto; and to abandon such portions, or any portion of such undertaking, as to them, the said directors, shall in their absolute discretion seem fit, and to proceed with the remainder in case same shall be deemed expedient by said directors for the time being, and for the insertion in such Act or Acts, of all or any such clauses, powers, and provisions, as they may think expedient, or Parliament may require; and also, in case no such Act shall be obtained within three years from the date hereof, then, of their own authority, and at their own discretion, to wind up and adjust the business transactions, liabilities, and affairs of or connected with the said undertaking, and generally, and for all the purposes of the undertaking, to represent and be competent to act on behalf of, and to bind all the subscribers thereto, and their respective executors and administrators."

"Seventh. That it shall and may be lawful to and for the said directors for the time being, to amalgamate and consolidate the shares or stock of the said undertaking with the shares or stock of the said Midland Great Western \* Railway Com- \* 878 pany, in such manner as that the said undertaking and the said Midland Great Western Railway Company may for all purposes whatsoever form and become but one company; and the said directors are hereby authorised to take all and every such step or steps, and to do all such act or acts as may be necessary for that purpose."

A Parliamentary subscription contract for the extension line, prepared on the same 22d of October, was also, on the 15th of January, 1846, signed by the defendant. This contract recited that an Act of Parliament had been obtained for making a railway from Dublin to Mullingar and Longford, called "The Midland Great Western Railway of Ireland"; that a company had been formed to make a railway from Mullingar to Galway, called "The Midland Great Western Extension from Mullingar to Galway"; that the capital of the last-mentioned company was to be

800,000*l.*, in 32,000 shares of 25*l.* each, and that "the said company was intended to form a part of, and to be at a future period amalgamated with, the Midland Great Western Railway Company." This subscribers' contract described the powers given to the directors; and, among other things, it was said, "that in case the bill for the extension railway from Mullingar to Galway shall receive the sanction of Parliament, it shall be lawful for the directors, if they shall think fit, to consolidate the stock or scrip of the said Extension Company with the stock or scrip of the said Midland Great Western Company, as soon as the bill for incorporating the Extension Company shall have received the Royal assent, or under such other circumstances, and at such other times, as by the said directors may be deemed right."

There had been a negotiation with the Galway and Belfast Junction Company, to take some of these extension shares; \* 879 but it proved unsuccessful; and on the 19th \* of January, 1846, the directors of the Midland Great Western Company passed a resolution to this effect: "To return their deposits to the Grand Junction Company,<sup>1</sup> if the amalgamation is declined by the shareholders, or if it is not sanctioned by Parliament, minus their share of the expenses incurred." A great many of the shareholders required, and received, the return of their deposits. The total sum subscribed for, in three parts, of the said Parliamentary subscription contract and shareholders' agreement respectively amounted to 530,000*l.*, consisting of 21,200 shares. Of these, 11,191 shares, representing a capital of nearly 280,000*l.*, were subscribed for by forty persons, thirteen of whom were directors of the company for making the Midland Great Western Railway of Ireland. On the 10th of February, 1846, a petition was presented to the House of Lords by the Midland Great Western Railway Company, under its common seal, which petition recited the Act of 8 & 9 Vict. c. 119, and prayed for an Act to be granted to the Midland Great Western Company to make a railway from Mullingar to Galway. The petition was altogether in the name of the Midland Great Western Company, which distinctly undertook at its own expense to make the proposed railway. The Act, which was afterwards passed, only granted a part of the prayer of this petition.

<sup>1</sup> By which term seems to have been meant "The Galway and Belfast Junction Company."

On the 21st of May, 1846, at a meeting of the directors of the Midland Great Western Railway Company, a minute was entered, to the effect that Alderman Boyce (a director) had returned from England, and reported having had interviews with the English brokers and solicitors (among whom was the defendant), and that he had submitted to them a proposition, to the effect that the board would undertake to recommend to the Midland Great Western Railway Company \* that the shares required for the Athlone \* 880 Extension should be amalgamated with the shares in the incorporated company, on the terms of 5*l.* being considered paid on each 25*l.* share, instead of 2*l.* 10*s.* At the same meeting, a resolution was passed, "that the secretary be authorised to write to the directors of the Grand Junction Company, offering them the option of this arrangement, or of accepting a payment of 30*s.* per share, with liberty to retire from the concern." This offer was proved to have been accepted by the directors, the extension shares being at that time 35*s.* per share in the market.

On the 6th of July, 1846, an Act (9 & 10 Vict. c. 224) was passed, granting a part only of the prayer of the petition of the previous 10th February. This Act was entitled "An Act to enable the Midland Great Western Railway Company of Ireland to make a Railway from Mullingar to Athlone,"<sup>1</sup>

<sup>1</sup> The 4th section enacted, "That it shall be lawful for the said company to raise by contributions among themselves, or by the admission of other parties as subscribers, or in part by each of those means, a further sum of money not exceeding 400,000*l.*, by creating 16,000 shares of 25*l.* each, in addition to the capital which they are at present authorised to raise."

The 5th section declared that it should be lawful, until the railway should be open to the public, to pay interest, not exceeding 4 per cent., on all sums called up in respect of the said shares; "provided that no interest shall accrue to the proprietor of any share upon which any call shall be in arrear in respect of such share, or of any other share to be held by the same proprietor during the period such call shall remain unpaid."

Sec. 6. That the additional capital of 400,000*l.* shall be considered as forming part of the general and original capital of the said company, and all the provisions contained in and referred to by the said recited Act, or in the Acts incorporated therewith, with regard to the original capital and shares thereby created, and as to the calls thereon, and as to the proprietors thereof, shall be in all respects applicable to the capital and shares hereby authorised to be raised and created, and to the proprietors thereof, save and except that no proprietor of any new share hereby created shall be entitled to any further or greater dividend

that being about half the distance from Mullingar to Galway.

\* 881 \* The directors of the Midland Great Western Railway gave notice of a meeting for the 18th of September, on the ordinary business of the company; and the notice then went on thus: "The said meeting will be made special, for the purpose of agreeing to certain terms, to be then and there proposed by the directors, for the amalgamation of the capital or shares of the Midland Great Western Railway of Ireland with the shares of the authorised extension of the said railway from Mullingar to Athlone." The meeting took place, and a report from the directors (nine of whom attended) was read, which contained the following statement:—

"The capital for the extension to Athlone having been subscribed for, in shares of 25*l.* each, upon which a deposit of 2*l.* 10*s.* has been paid, the directors recommend, that, upon payment of a further sum of 2*l.* 10*s.* per share, the holders of this scrip shall be entitled to sealed certificates for their shares, with 7*l.* 10*s.* paid up on each. By this a bonus of 2*l.* 10*s.* will be given to the holders of these shares, and an equal proportion will be represented by the new shares as has been paid up on the shares

\* 882 in the original \* company, and both will in future be subjected to equal calls in proportion to their respective amounts. This arrangement the directors recommend as equitable and advantageous to both parties, and in conformity with the views expressed at the meetings of the company on the 21st of February and 22d of May last."

The following resolution was afterwards passed: "That the terms proposed by the directors of this company in their report of this day for the amalgamation of the shares in the extension from

thereon than in respect of and in proportion to the amount which may from time to time have been upon such share.

Sec. 7 made it lawful to borrow not exceeding 133,000*l.* (besides and exclusive of what was already borrowed under the preceding Act); but no part of such sum should be borrowed until the whole capital had been subscribed for and half paid up; "and all the powers and provisions of the recited Acts relating to the borrowing of money, or the creation of new shares and augmentation of capital, instead of borrowing, shall extend to the 400,000*l.* and the 133,000*l.* hereby authorised to be raised."

The expression "The Company" in this Act was expressly declared to mean "The Midland Great Western Railway Company of Ireland."

Mullingar to Athlone with the shares in the Midland Great Western Railway Company of Ireland be now approved of, viz. that on the shares in the extension being registered, and a further sum of 2*l.* 10*s.* paid on each 25*l.* share, the directors of the company are hereby empowered to issue sealed certificates of the company in receipt of same, such certificates being written in the company's books as 7*l.* 10*s.* paid up."

A copy of the report and resolution was afterwards printed and sent to every shareholder, both on the trunk and extension line. At the meeting of the 18th of September, 1846, the seal of the company was affixed to the shareholders' book. That book did not contain the names of the shareholders in the extension line, but they were introduced into a book made up in March, 1847, and the defendant was then entered as the holder of 200 shares of 25*l.* each. The entry did not exist at the moment the first call was made on the defendant, but did exist before the second and third calls were made.

BARON PARKE directed the jury that "the Parliamentary subscription contract and shareholders' agreements, if proved to the satisfaction of the jury, gave ample powers, on behalf of the subscribers thereto, to the directors mentioned in the agreement, in such number and assembled as therein mentioned, to obtain an Act of Parliament to \*incorporate the subscribers \*883 thereto, or to amalgamate them with the plaintiffs' company, without an Act of Parliament for that special and express purpose, or any other Act of Parliament than that which was obtained as aforesaid; and that if the contract and agreement were so proved that they were authorised to adopt the course which was adopted by them, and that the nine directors present at the meeting of the 18th of September, 1846, were competent to exercise such powers in the manner in which they did, so as to bind the defendant to pay calls on 200 shares in the plaintiffs' company; and that he was bound by the exercise of the powers, as they were exercised, to pay such calls, and thereby became a holder of 200 shares in the plaintiffs' company, without any act of acceptance by him of the terms contained in the resolution of the 18th of September, 1846, if the jury believed the evidence, and also believed that the nine directors in so exercising their powers had acted honestly and without fraud." The defendant's counsel excepted to this direction in its very terms. The



jury found a verdict for the plaintiffs, and, under the learned Baron's direction, the verdict was entered separately on each call.

The bill of exceptions was argued in the Exchequer Chamber, before Justices Patteson, Wightman, Erle, Williams, and Talfourd; and the first-named learned Judge, on the 5th of February, 1851, delivered the unanimous judgment of their Lordships, awarding a *venire de novo*. The present writ of error was brought on this judgment.<sup>1</sup>

<sup>1</sup> The following are the material parts of the judgment. The case has not yet been reported elsewhere :—

“ There is no provision in the Act that the new shares, if created, or any part of them, shall be appropriated to the persons who had so subscribed ; they are not noticed throughout the whole Act, and it is left quite at the option of the directors, whether any new shares at all shall be created ; whether the subscribers to the extension line shall be admitted at all to take those new shares, supposing them to be created, or if admitted, on what terms their admission should be. All this is apparently left entirely to arrangement. After the Act had passed, and after the powers of the directors of the proposed new company had expired for want of fresh registration, a notice of a special meeting of the existing company, the defendants in error, is given for the purpose of settling the terms of amalgamation. That meeting is held on the 18th September, 1846, and is a meeting of the existing company only ; and a resolution is passed that the subscribers to the new company who had paid 2*l.* 10*s.* per share, should be admitted on payment of a further sum of 2*l.* 10*s.* per share, and be registered as having paid 7*l.* 10*s.* per share, giving them a bonus of 2*l.* 10*s.* Nine of the directors of the existing company, the defendants in error, who had also been directors in the proposed new company, while its registration lasted, attended that meeting, and joined in that resolution, but they do not profess to consent to the resolution on behalf of the subscribers to the extension line, or pretend to act at that meeting as directors of the proposed new company, or as agents of the subscribers to it. The plaintiff in error never accepted the proposed terms, but he was afterwards registered as a shareholder of the original company, that of the defendants in error, without his assent.

“ In the summing up it seems to have been laid down as a matter of law that the nine quondam directors had, by reason of the language and power of the subscribers' contract, power to bind the subscribers to the terms of amalgamation, and taken as a matter of fact that they did so by the resolution at the meeting of the 18th of September, 1846, if all was done *bonâ fide* in the opinion of the jury ; but it being difficult to maintain this proposition, the counsel for the defendants in error say that such was not the meaning of the summing up, or that, if it was, it was immaterial, for that the amalgamation was complete by the passing of the Act of the 9th and 10th of Victoria, c. 224, and that by the operation of that Act *per se* the plaintiff in error became a shareholder in the original company, the defendants in error. No doubt the intention of all parties was to create a new company for the extension line, and to amalgamate that new company with the original company. That object might have been effected as well

\* *The Solicitor-General (Sir F. Kelly) and Mr. Goldsmith* \* 884  
 (*Mr. Bovill* was with them), for the plaintiff in error. —  
 The first question is as to the effect of the Act of 1845.  
 It is submitted that when the Act of July, 1846, was  
 \* passed, — and both are to be read together, — there was a \* 885  
 complete incorporation of all the subscribers to the two  
 lines of railway. The disposition of the funds of the two com-  
 panies of course follows the same rule. The fourth clause of the  
 Act of 1846 is mainly relied on against the plaintiffs in error.  
 But it must be recollected that, when that clause came into opera-  
 tion, there was in existence this Parliamentary contract, by which  
 a body of persons had undertaken an obligation to pay up a cer-  
 tain capital, and to complete a railway. The fourth clause is not  
 framed with great accuracy of expression ; but it is plain that its  
 provisions are not imperative. It will be said that the  
 clause \* applies to the Midland Great Western Railway \* 886  
 Company alone ; but it is submitted that, although that  
 name alone is used in the Act, its provisions apply to those who  
 were then seeking to make a railway from Mullingar to Athlone ;  
 and the real meaning of the preamble must be taken as declaring  
 the fact, that the original company and another company had  
 associated themselves together for that object. The purpose of the  
 clause was, that if some parties failed to pay up their capital, the  
 others might, by contribution among themselves, or by the admis-  
 sion of fresh parties, raise a further sum not exceeding the sum  
 mentioned.

by one Act of Parliament as by two, the one incorporating a new company,  
 and the other amalgamating it ; but the question is, whether that intention  
 is carried into effect by the Act that was passed or not ? The 2d section of the  
 Act was relied on as embodying, in the 9th and 10th Victoria, c. 224, all the  
 provisions of the Act of the 8th and 9th Victoria, c. 119 ; but as neither of  
 these Acts notices the intended new company or the subscribers to it, that em-  
 bodying it cannot carry the case one step further. Both Acts taken together,  
 neither, of themselves, create a new company, nor amalgamate it or the subscrib-  
 ers to it with the original company. They only enable the defendants in error  
 to construct the extension from Mullingar to Athlone, either with their own funds  
 or by raising 400,000*l.* by the creation of 16,000 new shares. If the latter course  
 was adopted, the persons taking those new shares must do so, by arrangement  
 with the existing company, the defendants in error.

“ The plaintiff never did so arrange with them either personally or by any  
 agent authorised by him, or professing to bind him. He therefore never became  
 a shareholder at all.”

[THE LORD CHANCELLOR. — Could the defendant have compelled these directors to give him shares in the new amalgamated company to the amount of his subscription to the original company? If he had such a right, how was he to enforce it?]

He could have compelled them, and his right might have been enforced by mandamus.

[LORD CAMPBELL. — We should have great difficulty in granting any such mandamus.]

The difficulty would be because of the novelty of the proceeding. The principle in favour of it is clear. The Act of 1845 gives the subscriber a right to the shares subscribed for, and the holder of the scrip would have a right to come to the Court for a mandamus to have his title completed. He might also file a bill in equity. The Act of 1845 does not make subscribers more imperatively shareholders than does this Act itself. By the fifth section, the directors are authorised to pay interest at 4 per cent. on all paid-up capital till the railway is opened; which is another proof how much the subscribers are to be regarded in the light of shareholders; and in that clause there is no distinction made

between one set of subscribers and another. The sixth section, by the expression “any new \*share hereby created,”

\*887 shows that the legislature intended to create all the new subscribers into shareholders. Taking all these provisions together, the matter is clear. The question is, whether what is known to be the customary course is applicable here. If this was a case in which a person claimed to be recognised as a shareholder, there would be no answer to his claim, and consequently he can make no answer to his liability. Again; if, by the act of subscription, the subscriber becomes *ipso facto* a member of the company, then it is not necessary that there should be any formal acceptance by him of the shares allotted to him. The omission of his name from the register would not deprive him of his rights, nor can his mere non-acceptance exempt him from liability. It is true that there was no specific form of appropriation of shares; that, like some other matters, was left entirely to the discretion of the directors; but the want of such form can make no difference. The first question is, whether the second section of the statute is imported into this Act: the second question is, whether, by the general effect of the Act, the original subscribers are not members of the company. It was said in the judgment of the Court of

Exchequer Chamber, that there was no distinct provision of the Act for that purpose. But that rather confirms than displaces the argument, that the general power to amalgamate the company having been created, the details were entirely left to the discretion of the directors. The amalgamation itself was really effected by the provisions of the Act. In that view of the matter, the meeting of the 18th of September was not important; for if he was not a shareholder by the Act, he was not made so by any thing there done; and if he was, he could not in like manner be either divested of his rights or exempted from his liabilities.

It is clear that the Act did not contemplate that the \*sums necessary for the works could be raised from the \*888 funds of the existing company. A power of creating new shares and raising fresh funds was therefore given. One of the means of doing this was the amalgamation of the companies, and that was effected by the Act itself. In both Acts the same language is used as to the capital and shares, and both Acts must be taken together. The case of *The London Grand Junction Railway Company v. Freeman*<sup>1</sup> decided that a transferee of scrip became, by registry of his name in the shareholders' book, liable to calls; so that, at all events, the judgment in the Court below is good against the defendant for a part of the calls; but here the case is stronger, for the Act gave power to these parties to raise money "amongst themselves"; and that phrase must mean amongst those who subscribed the deed, — transferees who were not registered, as well as registered shareholders. The provisions of the Act therefore show that the defendant was a shareholder, and that he was liable to pay up these calls.

*The Attorney-General (Sir F. Theigier) and Mr. Anderson (Mr. Rochfort Clarke was with them) for the defendant in error.* — It was not pretended in the Exchequer Chamber that any statutory amalgamation had really taken place. If so, then the foundation of the claim here fails. Nobody disputes about the extent of the powers given to the directors, but the argument here is that those powers, whatever they were, have not been exercised. The contention on the other side now is, that as soon as the Act of July, 1846, was obtained, nothing more was necessary; for that the defendant thereby became a shareholder in the plaintiffs' company.

<sup>1</sup> 2 Railway Cases, 468.

The defendant denies that that Act had any such effect.

\* 889 \* There were two distinct companies, — one incorporated by Act of Parliament in May, 1845, the other provisionally registered in July, 1845; and though the directors in both happened to be the same individuals, yet the undertakings in both were entirely different. A third company, called the Belfast and Galway Railway Company, had been provisionally registered. The defendant was not a shareholder in that company, but he and his partners were solicitors to it. Then the extension company was promoted by the original company, and those who took shares in it understood that it was ultimately to be amalgamated with the original company. On payment of a certain sum, the one was to merge in the other. It was then for the first time that Leech proposed to become a shareholder in the company from Mullingar to Galway. The understanding as to the purpose of amalgamation may be admitted; but how was that to take place? The powers of the provisional directors, and the consequences resulting from them, must be determined by reference to the Parliamentary contract and the subscribers' agreement. In the agreement, the first clause is, that the subscribers will form themselves into a company; and the second fixes the amount of the capital. The fourth gives the directors power to manage the undertaking, to do all that is necessary for that purpose, to obtain an Act of Parliament, and if that cannot be obtained, to wind up the affairs of the company. The seventh, no doubt, gives a general power to the directors to amalgamate the undertaking with that of the Midland Great Western; but the mode of amalgamation itself is left to be provided for by other sections. The Parliamentary contract does not carry the matter one step further. It is possible that the purpose in view might have been effected by means of one Act of

Parliament amalgamating the two companies; but the first \* 890. object was to establish two separate \* and independent companies by separate Acts of Parliament. After a short time, it was found that only about one fourth of the intended capital was subscribed for; it was therefore clear that it would be an abortive scheme. A meeting of the shareholders of the proposed company should have been called, but that was not done, for the directors of the Midland Great Western Company, being in possession of the subscribers' agreement and of the Parliamentary contract, because the same individuals happened to be directors of

both the companies, determined, for the benefit of that company, to use these deeds in applying for the extension Act. This use of the subscription contract was in direct violation of the trust placed in the directors of the proposed line. The answer on the other side is, no matter who were the moving parties, the Act was granted, and that Act virtually incorporated all the shareholders in the proposed Extension Company with the original shareholders in the Midland Great Western line, so that every thing which subsequently occurred was immaterial. That argument cannot be maintained. "The powers in the Act only applied to the works thereby authorised to be made. The 8 Vict. c. 16, defines what the word "undertaking" shall mean; namely, "the undertakings or works, of whatever nature, which shall by the special Act be authorised to be executed." There was no incorporation of the two companies under the 9 & 10 Vict. c. 224, by which the defendant became a shareholder in a new incorporated company, but that Act merely gave a power to the company to make a new work.

[THE LORD CHANCELLOR. — There is an authority to admit new subscribers.]

That is merely to enable them to raise the necessary funds, if without admitting new members they should not have funds sufficient. The question is, what are the rights of the defendant in the Extension Company under this clause? \* It is \* 891 said that he could compel his admission as a shareholder by mandamus or bill in equity. The question on a bill in equity would turn on this. In getting the Act, the directors made use of the money of the subscribers to the extension line, in order to make up the sum required by the standing orders. It would be difficult for the company after that to deny the claim of the shareholders attributed to their subscriptions. The original shareholders had an option to do the works, either by themselves or by the aid of new subscribers, or in part by either of these means, in addition to the capital which they were authorised to raise. Did they adopt this latter course, and create additional shares? It is not pretended that they did. The directors of themselves could not do so. By sec. 91 of the Companies Clauses' Consolidation Act, they could not augment the capital without first calling a meeting of the company. No such meeting was called. The directors alone passed the resolutions. That was an act beyond their

power. There were no provisional directors of the proposed extension line legally in existence at that moment, for the provisional registration had come to an end in July, 1846.

It is said that the proceedings on the 6th of February, 1846, were equivalent to an amalgamation ; but the answer to that is, that the meeting was merely one of the members of the Midland Great Western Company ; and it is not because persons happen to possess one character, being members of company A., but assemble at a meeting in another, namely that of members of company B., that their resolutions at that meeting can bind those other members of company A., who were not present at the meeting. Besides, if the meeting on the 6th of February was equivalent to an amalgamation, there was no necessity for making the proposition

in May, that the companies should amalgamate ; and yet \* 892 the proposition was then made. Their own acts \* show that they did not claim the power now pretended to be vested in them. But even supposing that they had power to amalgamate the companies, did they exercise that power ? So far from it, it appears, even by their own resolutions, that on the 18th September, 1846, at the meeting then called by the directors, this resolution was passed : “ That the terms proposed by the directors of this company ” — namely, the Midland Great Western Company — “ in their report of this day, for the amalgamation of the shares in the extension from Mullingar to Athlone with the shares in the Midland Great Western Railway Company of Ireland, be now approved of ” ; and the directors were authorised to issue certificates in conformity therewith. That very resolution shows that nothing was then definitively done ; and before the meeting of the 18th September, 1846, the directors of the Extension Company had ceased legally to possess that character, and of course ceased to possess the power which was incident to it. They could not at that moment, by any act of theirs, bind the company.

But supposing that the directors had the power to make the proposal to the subscribers to the extension line, they could not compel the latter to come in and take the shares. They themselves admitted this by the course which they pursued with regard to the shareholders of the Grand Junction line. With them, too, a case of amalgamation had been proposed, but the shareholders were expressly declared, by the resolutions of January and May, 1846, to be entitled to a return of the deposits, and in fact those share-

holders did receive back their deposits, and retired from the concern. The utmost amount of the resolution of September, 1846, was to give the shareholders of the extension line the opportunity to come in and join the Midland Great Western Company ; but of that the defendant never availed himself. There is nothing in the Act of Parliament \* which, under such cases, fixes a lia- \* 893 bility upon him. There never was a contract by which these shareholders were bound ; there never was any authority in the directors to make such a contract. They could only offer an option to the shareholders ; they did offer it, and it was not accepted. The defendant, therefore, never was legally made liable to these calls ; and the judgment of the Court below, given in his favour, must be sustained.

*The Solicitor-General* replied. — All that was done at the meeting of the 18th of September was done as the common business of both companies. That business was fully authorised by the Act, which had the effect of making the subscribers to the one company shareholders in the other.

THE LORD CHANCELLOR. — My Lords, after the argument which we have heard, I beg to propose that the following question should be submitted to the learned Judges : “ Adverting to the record and proceedings in this case, ought the exceptions therein stated, or any and which of them, to have been allowed ? ”

The question was agreed to.

THE LORD CHIEF BARON asked for time to consider the question.

Adjourned.

December 9.

THE LORD CHIEF BARON. — My Lords, in answer to the question proposed to us by your Lordships, I have to report to your Lordships, that although we do not agree as to some of the points which have been argued before your Lordships, we are unanimously of opinion that one of the grounds of exception ought to have been allowed ; namely, that the directors \* were not \* 894 competent to exercise their alleged power in the manner in which they did exercise it, so as to bind the defendant, and that the defendant was not bound by what was done by the said nine directors in the supposed exercise of their said alleged powers,



and did not thereby become the holder of the said 200 shares in the plaintiffs' company ; because it appears to us that what was actually done on the 18th of September, 1846, was merely a recommendation to the general body of the company, which was incorporated by the first Act of Parliament, and assembled on that occasion, and was not an act of amalgamation by the nine directors, in pursuance of the power of amalgamation, assuming that they had such a power.

THE LORD CHANCELLOR. — My Lords, the answer which we have just heard on the part of the learned Judges, in effect, if your Lordships adopt the law as there laid down, decides this case ; for although it does not answer in all respects the question which was put to the Judges, yet it does sufficiently answer that question to enable you to dispose of the case now before the House.

I certainly agree in the opinion which has been delivered. It appears to me perfectly clear, that, supposing the directors did originally possess the power to bind the persons who had subscribed to the project for the extension, that power never was exercised. All that the directors did amounted to a recommendation to the subscribers to adopt certain terms that had been offered ; but they were not bound to accept such terms. These terms never were in form accepted. There is not the slightest evidence to show their acceptance by the persons against whom the company proceeded. The proprietors of the Galway and

Belfast Junction Railway Company, for example, who  
\* 895 \* stood upon exactly the same footing, rejected the terms ;

and with them a compromise was made. It appears to me, therefore, my Lords, that it would be quite unnecessary and unwise to go into the other question, which is not now necessary to decide. But upon this point I entirely agree with the opinion which has been delivered, and I believe the same opinion is entertained by my noble and learned friends near me. If that is so, I should move your Lordships that the decision of the Court be affirmed, and that judgment be given for the defendant in error.

LORD CAMPBELL. — My Lords, I entirely agree in the view which has been taken of this case by the Lord Chancellor. It is certainly not necessary to consider whether, under the subscribers' agree-

ment and the parliamentary contract, the directors had the power, they clearly not having exercised it; and therefore, upon the question whether they had the power or not, I give no opinion. But it seems to me that we are bound to give an opinion upon the other question which was argued, namely, whether by the Act of 1846, the subscribers were *ipso facto* made shareholders; for if they were, then the direction of the learned Judge, which is declared erroneous, would be immaterial, and if it was wholly immaterial, then we ought not to order a *venire de novo*. For that reason, therefore, I think myself bound to give my opinion on the question whether the Act of 1846 makes the subscribers shareholders to the Extension Company. In my opinion, clearly it does not; because, whatever the equity of the case may be, we must look distinctly to see what has been enacted; and, looking at the 4th section of the 9 and 10 Vict. c. 224, it seems to me that it was left discretionary with the directors, after the Act passed, whether they would admit the subscribers as shareholders \* or not. What is the language of that section? [His Lord- \* 896 ship read it. See ante, p. 880, n.] That seems to me to be wholly permissive; and if the company had funds of its own, without requiring any additional sum to be subscribed, I apprehend that from those funds the directors might have completed the railroad from Mullingar to Athlone. If that is so, then it is quite clear to me that the subscribers were not *ipso facto* shareholders; and if so, then the direction of the learned Baron was most material, and being erroneous, there ought to be a *venire de novo*.

LORD TRURO. — My Lords, I concur in the opinion expressed by my noble and learned friend the Lord Chancellor, and also concur entirely in that which has been expressed, somewhat more at large, by my noble and learned friend near me.

The case furnishes, I think, many topics in support of this opinion; but it is quite unnecessary to occupy your Lordships' time in going over them, the learned Judges being unanimous in their opinion, and there being a coincidence in that respect between their opinions and those of the noble and learned Lords.

I think it is perfectly clear that the Act of Parliament did not amalgamate the two companies, and that no intention ever was entertained that it should have that effect, but that it was left, as

my noble and learned friend near me has expressed it, entirely optional; and all that was done after the Act was obtained was the making of the recommendation which has been referred to, which recommendation in its terms utterly excludes the inference that the passing of the Act was considered an amalgamation of the two companies. But the effect of the resolution which was passed, and what was done afterwards, also show that

\* 897 \* at no subsequent time was it considered an amalgamation until it became necessary to make some call for money, and then this seems to have occurred to the parties. In October, 1846, the first register-book was signed, and in that book the directors did not include the extension subscribers; but in March, 1847, for the first time, they were registered, when, from the state of the funds, the reason for this being done was pretty obvious. It appears to me to have been an attempt to draw in a few extension subscribers, only a few, into a concern which was not very prosperous at the time. I am quite satisfied that the Act did not operate to amalgamate the two companies, and that the resolution which was subsequently proposed was not calculated to have that effect. It was a mere proposal, which proposal was never adopted by those who were entitled to exercise an option upon it, but have not exercised it in favour of adopting the proposal. It appears to me, therefore, that the judgment of the Exchequer Chamber is perfectly correct in point of law, and that it ought to be affirmed by your Lordships.

THE LORD CHANCELLOR. — My Lords, I did not touch upon the point which my noble and learned friend has alluded to amply, because I thought that the opinion which has been delivered to your Lordships by the learned Chief Baron, on the part of the learned Judges, implied that that point could not be maintained. It was one on which I never entertained the slightest doubt. It is perfectly clear that that Act of Parliament gave power to the directors of the original company, if they pleased and could agree with the extension subscribers, to admit them; and if they had been admitted, they would have formed part of the original company. But the very recital of that Act of Parliament is,

\* 898 that the proprietors \* of the Midland Company proposed to execute the extension at their own expense, and for that purpose they have ample powers granted to them. The sum

raised did not tally with the sum which was to be paid by the Extension Company without reference to the other subscribers; and therefore, upon looking at the Act of Parliament, I cannot say that I ever entertained the slightest doubt on the point; and as I considered the judgment, as delivered, by fair implication was conclusive upon it, my belief that it was so was the only reason I did not say a word upon it; but I entirely agree in the opinions delivered upon it by my noble and learned friends. The three cases depend upon the same argument, and therefore they will be disposed of in the same way.

*Judgment of the Court of Exchequer Chamber affirmed.*

The House was applied to, but declined to say any thing about costs.

Lords' Journals, Dec. 9, 1852.

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The MIDLAND GREAT WESTERN RAILWAY of Ireland v. EDMONDS.

The MIDLAND GREAT WESTERN RAILWAY of Ireland v. JOHNSTON.

THESE two cases, which likewise came up by writ of error from the Exchequer Chamber, arose upon the same facts, and involved the same questions. By consent of parties, they were made to depend on the judgment in the first case.

Lords' Journals, Dec. 9, 1852.



# INDEX.

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## AGREEMENT.

A variance in the agreement to which a surety has subscribed, which variance has been made without the surety's knowledge or consent, and which may prejudice him, or amount to the substitution of a new agreement for a former one, will discharge the surety, though the original agreement, notwithstanding such variance, may be that on which the liability is substantially incurred. — *Bonar v. Macdonald*, 226.

1. A. became surety for B.'s conduct as a clerk in a bank. B. was subsequently appointed to a better situation in a branch of the same bank, and A. extended his suretyship to this new situation. B. afterwards, while remaining in the same situation, undertook, on having his salary raised, to become liable to one fourth of the losses on discounts. No communication of this new arrangement was made to A. B. allowed a customer considerably to overdraw his accounts and thereby the bank lost a sum of money: *Held*, that the surety could not be called on to make good this loss, though it fell within the terms of the original agreement, as the fresh arrangement was the substitution of a new agreement for the former one, and A. was thereby discharged. — *Id. ib.*
2. A., a landowner, through whose estate a part of a projected railway was to pass, became a party to a deed with the projectors of the railway, by which he covenanted to withdraw his opposition to their bill and to oppose a rival bill, and they covenanted to pay him a certain sum of money in case their bill should pass within six months from the date of the deed, or to pay him a different sum if the rival bill should pass within eighteen months from the date of the deed. It was then provided that, if the bill of these projectors should not be passed into a law within six months from the date of the agreement, either party might put an end to the agreement by a notice. The deed then contained a covenant on \* the part \* 900 of these projectors, by which they agreed, if the two companies should be amalgamated, to pay a certain sum within three months after such amalgamation. The deed was dated on the 16th of March, 1846. The two companies were amalgamated in June, 1846; but no bill ever passed at the instance of these projectors alone. In November, 1846, these projectors gave a notice to put an end to the agreement. A. declared in covenant against these projectors on that clause of the deed by which he was to receive a sum of money within three months after the amalgamation of the companies. The defendants pleaded that their bill had never

passed into a law, that at the end of six months they had given notice to put an end to the agreement, and that they had not taken the plaintiff's land: — *Held*, that this plea was no answer to the action. — *Capper v. Lindsey (Earl)*, 293.

3. A. made his promissory note payable on demand, with interest, in favour of B. and C., the executors of D. A. was, with several other relatives, to be entitled to certain benefits, under D.'s will, upon the coming of age of the youngest legatee named in the will. By an agreement made between the legatees, the executors were authorised to lend the funds in their hands on personal security; and a part of these funds having been lent to A. (as well as to the other legatees), he gave the executors the note in question. By the agreement it was settled that the notes given to the executors should not be sued on till the youngest legatee had arrived at the age mentioned in the will. The executors did not sign this agreement; but when it had been signed by the other parties, took it into their possession. The executors brought the action while the legatee in question was alive, and before he had attained the specified age. A. pleaded the agreement as an answer to the action, averring that the plaintiffs accepted and received the note on the terms and conditions of the agreement, and that the youngest legatee was still under age at the time the agreement was proved: — *Held*, that the plea was bad in substance, for that the agreement was collateral, and was not between the same parties as the note. — *Salmon v. Webb*, 510.

**AMALGAMATION.** See RAILWAY COMPANY.

**APPEAL.** See PRACTICE.

*Semble*, that a decree appealed from, but not adjudicated on further than the dismissing the appeal generally, may be included in a subsequent appeal. — *Tommey v. White*, 49.

- \* 901 \* *Semble* also, that decrees and orders which have not been enrolled may, after any length of time, on being enrolled, be brought under appeal with a recent order made in the same cause, and duly enrolled. — *Id. ib.*

Where one part of a decree has been appealed against, and has been affirmed, that circumstance will not prevent an appeal being brought (if in due time) against another part of the same decree. — *Birch v. Joy*, 565.

**ASSIGNEE.**

The assignee of a chose in action, or security of any kind, where there has been no fraud, stands in exactly the same situation as the assignor as to the equities arising upon it. He must be taken to be cognizant of them. It is his duty to make inquiries, and, as a general rule, the creator of the security thus assigned is not bound, on receiving a simple notice of the assignment, to volunteer information. If a loss arises, it falls upon him whose duty it is to make the inquiries and who has not made them. — *Mangles v. Dixon*, 702.

But if the notice given by the assignee discloses, on the face of it, that which induces the belief that he has been deceived in accepting the assignment, the creator of the security is bound to inform the assignee of the real circumstances; and if he should not do so, he will be bound to perform the

stipulations of the security, and cannot be allowed to take advantage of the equities existing as between the assignor and himself. — *Id. ib.*

The performance, by the creator of a security, of any intermediate stipulations in it, after he has received notice of its assignment, being an act done under both a legal and an equitable liability, can never, in itself, be considered as a ground for fixing him with a liability to something beyond that by which he is equitably bound. — *Id. ib.*

A. was the owner of a vessel. B. was to charter it for a particular voyage to seek a particular cargo. Its tonnage was larger than B. required. A. was willing to undertake half the risk, and was to have half the profits. A charter party was executed, on the 24th of April, 1845, by which the vessel was declared to be let to freight, at 16s. a ton per month, to B., and bills were to be given, and payments from time to time made, by B., which, taken together, would cover one half of the amount stipulated for the freight. On the arrival of the ship at home, B. was to give a bill at \* ninety days' date for the remainder of the freight. Two other \* 902 instruments were executed on the same day; by the first of which A.'s clerk was to join in the adventure, and "after payment or deduction of the freight, and all incidental expenses, the profit or loss" was to be borne by the parties in equal moieties; and by the other, A. gave to B. a guarantie for the due performance, by the clerk, of the stipulations he had entered into. On the 1st of December, 1845, while the ship was on the voyage, A. assigned to C. the charter party, and wrote on the margin thereof a note addressed to B. requesting him to pay "what is due." C. gave B. notice of this assignment and note. The notice was in the ordinary form, and no inquiries were made. B. continued the payments which, by the stipulations in the charter party, he was bound to make. The vessel returned in August, 1846, and the adventure turned out a loss. B. claimed, as against C., to balance the accounts of profit and loss, as he would have been entitled to do with A. had the charter party not been assigned. *Held*, that in equity he was entitled to do so. — *Id. ib.*

**ATTORNEY.** See **SOLICITOR, TRUSTEES, and TRUSTER ACT.**

If an attorney or agent can show that he is entitled to purchase property, notwithstanding his character of attorney or agent, yet, if instead of openly purchasing it, he purchases it in the name of a third person, who appears as his trustee or agent, without disclosing the fact, such purchase is void. — *Lewis v. Hillman*, 607.

**BILL OF EXCEPTIONS.**

1. Evidence of foreign law was tendered on the trial of an issue before a jury. It was objected to, on the ground that, as the issue did not, in forms, raise any question of foreign law, the evidence was a surprise on the party against whom it was produced. The evidence was admitted, and the objection of surprise was put on the record as one of the heads of a bill of exceptions. The evidence was really inadmissible, on the ground that the *lex fori* was that by which alone the issue could be decided; but no notice of this ground of objection was taken in the bill of exceptions: — *Held*, that the Court of Error could not look beyond the bill of exceptions, but must decide on that alone, and that the objection of



surprise was not sufficient to exclude the evidence. — *Bain v. The Whitehaven Railway Company*, 1.

- \* 903 \* 2. An exception, abandoned in the Court below, was allowed to be argued in this House. — *Id. ib.*
3. A bill of exceptions was tendered to a Judge's direction, and, under the 55 Geo. III. c. 42, § 7, was signed by him at the time of the trial. The draft, thus prepared, was, some months afterwards, more formally drawn up, and was tendered to him for signature. He refused to sign it, unless a sentence, explaining his direction, was introduced into the bill, and the party excepting finally consented to its introduction. The bill of exceptions, with this explanation forming part of it, was presented to the Court: — *Held*, that the introduction of this explanation was highly irregular; but that, being on the record, the Court below, and this House, could only look to the record, and could neither receive an affidavit of the facts, nor examine the draft of the exceptions, originally prepared and signed. — *Glasgow (Earl) v. The Hurler Alum Company*, 25.

BILLS OF EXCHANGE. See AGREEMENT, 3.

CANAL COMPANY. See COPYHOLD.

A canal, formed under a private Act of Parliament, had three levels, of which A was the highest, B the middle, and C the lowest level. The canal proprietors (though without authority under their Act to do so) erected engines between the C level and the plaintiff's mill-forge, and pumped back the water, which, after serving the purposes of navigation in levels A and B, had flowed into level C. In 1826, a new Act, repealing former Acts, and re-enacting their provisions, with certain alterations and additions, was passed. The 15th section gave the canal proprietors authority to maintain engines, &c. for supplying the canal with water, and for that purpose to have reservoirs and feeders supplied from all brooks, streams, &c. from which they were lawfully supplied before the passing of the Act, and "from time to time to raise the water of the canals from one level to another, or to any reservoirs; and for any of the purposes aforesaid to use such engines as they should judge proper, making full satisfaction for all damages to be sustained by the owners of any mills, forges, brooks, streams, &c. taken, used, removed, diverted, or injured," in execution of the powers of the Act. By the 80th section, the canal proprietors were forbidden to take for the use of the canal any water out of the river above the plaintiff's forge, and they were directed to maintain \* flood-weirs, so that all waste water running into level C, not required for the purposes of the canal, should flow into the river above the plaintiff's forge. The proprietors pumped up as before the water out of the level C back into the level A, in consequence of which, except on extraordinary occasions, no water escaped over the weirs into the river: — *Held*, that they were entitled to do so, and that such pumping back of the water from one level of the canal to the other did not give the plaintiff a right to compensation under the Act. — *Elwell v. The Birmingham Canal Company*, 812.

CHALLENGE. See JURYMAN.

CHARTER PARTY. See ASSIGNEE.

A. was the owner of a vessel. B. was to charter it for a particular voyage

to seek a particular cargo. Its tonnage was larger than B. required. A. was willing to undertake half the risk, and was to have half the profits. A charter party was executed, on the 24th of April, 1845, by which the vessel was declared to be let to freight, at 16s. a ton per month, to B., and bills were to be given, and payments from time to time made, by B., which, taken together, would cover one half of the amount stipulated for the freight. On the arrival of the ship at home, B. was to give a bill at ninety days' date for the remainder of the freight. Two other instruments were executed on the same day; by the first of which A.'s clerk was to join in the adventure, and, "after payment or deduction of the freight, and all incidental expenses, the profit or loss" was to be borne by the parties in equal moieties; and by the other A. gave to B. a guarantee for the due performance, by the clerk, of the stipulations he had entered into. On the 1st of December, 1845, while the ship was on the voyage, A. assigned to C. the charter party, and wrote on the margin thereof a note addressed to B., requesting him to pay "what is due." C. gave B. notice of this assignment and note. The notice was in the ordinary form, and no inquiries were made. B. continued the payments which, by the stipulations in the charter party, he was bound to make. The vessel returned in August, 1846, and the adventure turned out a loss. B. claimed, as against C., to balance the accounts of profit and loss, as he would have been entitled to do with A. had the charter party not been assigned: — *Held*, that in equity he was entitled to do so. — *Mangles v. Dixon*, 702.

## \* CONDITION.

\* 905

A lease contained a covenant by the lessor to do certain work, and at the end of the covenant were these words, "and the whole of which is agreed to be left to the superintendence of the defendant and the plaintiff's son": — *Held*, that this was neither a condition precedent to nor concurrent with the covenant. — *Jones v. Cannock*, 700.

CONSTRUCTION. See ECCLESIASTICAL COURTS, STATUTES.

## CONTRIBUTORY.

1. The 7 & 8 Vict. c. 110, does not create any new liability in an allottee of shares, beyond what his own contract imports. — *Hutton v. Thompson*, 161; *Norris v. Cooper*, 161.
2. A. wrote a letter of application for shares in a railway company which was provisionally registered, and received answer, in the usual form, declaring that certain shares had been allotted to him, on which he was required to pay a deposit. A. paid the required deposit, but neither signed the subscribers' agreement nor the parliamentary contract. The scheme was abandoned: — *Held*, that A. did not, by his letter of application for shares and by paying the deposits thereon, become a "member" of the company, or a "contributory," within the meaning of the Joint Stock Companies' Winding-up Acts. He merely bound himself to take such shares as he had applied for, should the company ever in fact be established. — *Id. ib.*
3. *Held*, therefore, that his name had been improperly put by the Master among the list of contributories, and that the Court below had rightly ordered it to be expunged from the list. — *Id. ib.*
4. A projected railway company, provisionally registered, is within the mean-

ing of the Winding-up Acts, which may therefore be applied to it if a Court of Equity shall so think fit. — *Bright v. Hutton*, 341.

5. The liability of a person as a contributory under the Winding-up Acts is not a question of law, but of fact. The test of his liability in equity is his liability at law. — *Id. ib.*
6. Contributories are those only who have contracted, by themselves or agents, with a creditor, or who have agreed to indemnify or repay, in part or in all, those who have contracted with the creditor on their own account. — *Id. ib.*
7. A. was a member of the provisional committee of a projected railway company, which had been provisionally registered, \*and the affairs of which were put under the authority of a managing committee. He accepted shares, and paid a deposit on them; but did no further act. The scheme was abandoned: —  

*Held*, that on these facts he was not liable to a creditor for business done under the orders of the managing committee towards completing the projected undertaking, and converting the association into a regular company, and consequently he was not liable as a contributory under the Winding-up Acts. — *Id. ib.*
8. The name of a person who had purchased shares in a joint stock bank was, after the stoppage of that bank, placed on the list of contributories, but only from the date at which he made the purchase. An appeal was presented by the official managers against this qualification of his liability. When the case was called on, this qualification was, by agreement, struck out, and the order of the Court below varied in that respect. — *Henderson v. Sanderson*, 698.

CONVERSION OF ESTATE. See LIMITATION OF REAL AND PERSONAL ESTATE, POWER TO CONVERT PERSONAL ESTATE, RIGHT HEIRS, WILL.

A testator made a will in the following form: "Whereas I am seised in fee simple of divers freehold manors, or reputed manors, messuages, lands, tenements, rents, and hereditaments, situate, &c. and of a leasehold estate in, &c. and also of a copyhold estate, situate, &c. and also of freehold estates, in, &c. and of large sums in the funds of England: Now I do hereby give and devise, after my just debts and funeral expenses and legacies are paid (which I order to be paid out of my personal estate), all my estates in the funds of England and all my said manors, &c." unto three persons in succession, and their sons successively in tail male, in strict settlement; "and for default of such issue, I give and devise the same to my own right heirs for ever." He then gave his trustees a power, with the consent of the person who might be in possession, to lay out his personal estate in the purchase of freeholds, &c. and to settle the same when purchased to such uses as were declared of his "manors, or reputed manors, messuages, lands, tenements, rents, hereditaments, and premises devised by this my will, as shall be then existing undetermined, or capable of taking effect; and to and for no other estate, use, trust, or purpose whatsoever": — *Held*, first, that the power to trustees to convert personalty into realty did not.

- \*907 operate as an absolute conversion; \*but, secondly, that, on the face of

the will, it was the intention of the testator to make the two funds a blended property, and to give them the character of real estate, and to make both properties go together, and to give both to persons expressly designated; and that such intention did not cease with the failure of issue male under the limitations, so as to make the real estate afterwards go in one way, and the personal estate in another. — *De Beauvoir v. De Beauvoir*, 524.

### COPYHOLD.

An Act of Parliament incorporated certain persons as a company for the purpose of making a canal, and gave them powers to purchase and hold lands for the purposes of the Act; it authorised persons to "contract for, sell, and convey their lands"; gave a form of conveyance "of all the estate, right, title, and interest" of the person conveying; and enacted that all such contracts, agreements, sales, conveyances, and assurances should be valid to all intents, &c. S. was a tenant of copyhold land, a portion of which was wanted for the purposes of the canal; he sold it to the company, and executed a conveyance according to the form given by the Act. The land was then applied to the purposes of the canal. On the death of S. the lord made a proclamation for the heir of S. to come in and be admitted as a tenant on the rolls of the manor. No one appeared to claim admittance, and the lord seized the land *quousque*. He afterwards brought ejectment against the canal proprietors, and obtained judgment against them, on the ground that the conveyance under the Canal Act had only vested in them an equitable estate in the copyhold land. He then interfered to stop the course of the navigation. The canal proprietors filed a bill against him, praying that the customary heir of S., or such other person as the plaintiffs might appoint, might be admitted to the copyhold premises, the plaintiffs undertaking to pay the fine and fees upon such admission; and further praying for a perpetual injunction and general relief. The Vice-Chancellor made a decree directing that the customary heir of S. (who had been made a party to the suit) should be admitted tenant to the copyhold premises in question, and when admitted should hold the same as trustee for the plaintiffs in the suit, and the amount of the fine was referred to the Master, and an injunction was granted as prayed: — *Held*, that the decree of the \* Vice-Chancellor was \* 908 right. — *Dines v. The Grand Junction Canal Company*, 794.

CORPORATION. See IRISH JURY ACT, JURYMAN.

COSTS. See REGISTRATION ACTS.

1. The House ordered the costs of an appeal, in a case arising out of the construction of a will, to come out of the estate, but the trustee having unnecessarily printed certain documents for the hearing of the appeal, the costs of such printing were disallowed. — *Prendergast v. Prendergast*, 195.
2. The House in overruling exceptions which had been allowed in the Court below, but which ought to have been overruled there, gave the costs in the Court below. — *Attorney-General v. Cox*, 240.
3. A petition to dismiss an appeal for incompetency was itself dismissed. The costs were reserved. — *Geils v. Geils*, 280.
4. In a suit for a divorce *à mensâ et thoro*, the wife obtained judgment in the

Court below, with costs; that judgment was reversed by the Lords, on the ground that the remedy sought was not the proper one, but the interlocutor was allowed to stand so far as it gave the wife the costs in the Court below. — *Paterson v. Paterson*, 308.

The wife, however, was not allowed her costs in the appeal. *Quære*. — *Id. ib.*

**COVENANT.** See AGREEMENT, CONDITION, LEASE.

**DEVISAVIT VEL NON.** See EQUITY, HEIR AT LAW, PRACTICE, 6, 7, 8, 9.

A verdict having passed against an heir, on the trial of an issue of *devisavit vel non*, a Court of Equity was held properly to have refused him a new trial. — *McGregor v. Topham*, 182.

**DIRECTORS.** See RAILWAY COMPANY.

**DISCLOSURE OF FACTS.**

The assignee of a chose in action, or security of any kind, where there has been no fraud, stands in exactly the same situation as the assignor as to the equities arising upon it. He must be taken to be cognizant of them. It is his duty to make inquiries, and, as a general rule, the creator of the security thus assigned is not bound, on receiving a simple notice of the assignment, to volunteer information. If a loss arises, it falls upon him whose duty it is to make the inquiries and who has not made them. — *Mangles v. Dixon*, 702.

But if the notice given by the assignee discloses, on the face of it, that which induces the belief that he has been deceived in accepting the assignment,

\* 909 the creator of the security is \* bound to inform the assignee of the real circumstances, and if he should not do so, he will be bound to perform the stipulations of the security, and cannot be allowed to take advantage of the equities existing as between the assignor and himself. — *Id. ib.*

**DISTRIBUTIONS, STATUTE OF.** See EXECUTOR.

**DIVORCE.** See COSTS, PLEADING, PRACTICE, 2.

1. Neglect, silence, shunning the wife's company, and declarations by the husband that he will never cohabit with her, do not constitute that "cruelty and maltreatment" in respect of which the law will grant to the wife a divorce *à mensâ et thoro*. — *Paterson v. Paterson*, 308.

2. Where, in a case of this sort, the Court of Session had pronounced for a divorce, the Lords reversed the interlocutor. — *Id. ib.*

3. Actual personal violence, or the immediate menace of it, is not the only ground of maltreatment in respect of which such a divorce will be granted. — *Id. ib.*

4. *Quære*, whether constant revilings and accusations of all sorts of crimes made, and falsely made, before friends and servants, would constitute a ground for such a divorce.

5. The general principle of the law as to divorce *à mensâ et thoro* is the same in England and Scotland. — *Id. ib.*

6. But it seems that a special principle exists in the law of Scotland, which permits a divorce for a wilful desertion continued for four years. — *Id. ib.*

**ECCLESIASTICAL COURTS.** See DIVORCE, EVIDENCE.

The 54 Geo. III. c. 68, § 9, prohibits a proctor from permitting or suffering "his name to be in any manner used in any suit, the prosecution or defence of which shall appertain to the office of a proctor, or in obtaining

probates of will, letters of administration, or marriage licenses" for the benefit of any other person. The 10th section enacts, "that in case any person shall, in his own name, or in the name of any other person, make, do, act, exercise, or perform any act, matter, or thing whatsoever, in any way appertaining or belonging to the office, function, or practice of a proctor, for or in consideration of any gain, fee, or reward, or with a view to participate in the benefit to be derived from the office, function, or practice of a proctor, without being admitted and enrolled, he shall forfeit 50*l.*": — *Held*, that, construing these two sections together, the acts intended by the latter section to be prohibited were those which were \*legally \*910 incident to the office of a proctor; not those which, though usually performed by him, were not of right incident to his office. And, therefore, that a registrar of an Ecclesiastical Court, who, in cases where there was no testamentary contest, had prepared the documents, and done the acts necessary for obtaining letters testamentary, and probates of wills, and other similar matters, had not thereby subjected himself to the penalty imposed by the 10th section. — *Stephenson v. Higginson*, 638.

**ECCLESIASTICAL PROFITS.** See **PREBEND**.

**ENROLMENT OF DECREE.** See **VICE-CHANCELLOR**.

**EQUITY.** See **ASSIGNEE**, **COPYHOLD**, **PLEADING**, **REGISTRATION ACTS**, **SETTLEMENT**, **TRUSTEE**, **VENDOR AND PURCHASER**.

The performance, by the creator of a security, of any intermediate stipulations in it, after he has received notice of its assignment, being an act done under both a legal and an equitable liability, can never in itself be considered as a ground for fixing him with a liability to something beyond that by which he is equitably bound. — *Mangles v. Dixon*, 702.

*Quære.* Whether a bill filed to set aside a sale and conveyance of an estate, which alleged fraud and set forth circumstances that did not come up to a case of fraud, and which bill was therefore dismissed, might not have been maintained, had the plaintiff abstained from making the charge of fraud and sought to set aside the sale and conveyances as improvidently made and hastily executed. — *Curson v. Belworthy*, 742.

**EVIDENCE.** See **FOREIGN LAW**.

1. Evidence of foreign law was tendered on the trial of an issue before a jury. It was objected to, on the ground that as the issue did not in terms raise any question of foreign law, the evidence was a surprise on the party against whom it was produced. The evidence was admitted, and the objection of surprise was put on the record as one of the heads of a bill of exceptions. The evidence was really inadmissible, on the ground that the *lex fori* was that by which alone the issue could be decided; but no notice of this ground of objection was taken in the bill of exceptions: — *Held*, that the Court of Error could not look beyond the bill of exceptions, but must decide on that alone, and that the objection of surprise was not sufficient to exclude the evidence. — *Bain v. Whitehaven Railway Company*, 1.
2. The law of the country where a contract is to be enforced, not \*that \*911 of the country in which it is made, governs the question of admissibility of evidence on the trial arising out of such contract. — *Id. ib.*
3. The Companies Clauses' Consolidation Act for Scotland (8 & 9 Vict. c.

17, § 9) requires, in the same terms as the English statute of that name, a book to be kept, containing, in alphabetical order, "the names of the shareholders, with the number of the shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares." The 29th section of the statute makes such book *primâ facie* evidence of a person being a shareholder. — *Held*, first, that as this was an exceptional privilege in favour of the company, the provisions of the statute with respect to the mode of keeping the book must be strictly complied with; and, secondly, that an entry in the book, describing A. as possessed of a certain number of shares, numbered from one given number to another given number, and stating a gross amount as paid upon these shares, was a sufficient compliance with those provisions, so as to render the book admissible in evidence. — *Id. ib.*

4. The statute requires that a book, to be called "The Register of Shareholders," shall be kept. The book actually kept was marked "Register of Proprietors": — *Held*, that this variation in the title did not prevent it from being given in evidence. — *Id. ib.*
5. In an action of libel, the defendant pleaded the general issue, and also a plea under the 6 & 7 Vict. c. 96, denying actual malice, and stating an apology. On the trial, the plaintiff, in order to prove malice, tendered in evidence other publications of the defendant, going back above six years before the publication complained of: — *Held*, that these publications were admissible in evidence. — *Barrett v. Long*, 395.
6. The 54 Geo. III. c. 68, § 9, prohibits a proctor from permitting or suffering "his name to be in any manner used in any suit, the prosecution or defence of which shall appertain to the office of a proctor, or in obtaining probates of will, letters of administration, or marriage licenses" for the benefit of any other person. The 10th section enacts, "that in case any person shall, in his own name, or in the name of any other person, make, do, act, exercise, or perform any act, matter, or thing whatsoever, in any way appertaining or belonging to the office, function, or practice of a proctor, for or in \*consideration of any gain, fee, or reward, or with a view to participate in the benefit to be derived from the office, function, or practice of a proctor, without being admitted and enrolled, he shall forfeit 50*l.*"
- \* 912 7. On the trial of an action for penalties brought on this statute, evidence from certain Ecclesiastical Courts was tendered, to show that it was customary for the registrar to do these acts, and to receive fees on account of doing them: — *Held*, that such evidence was properly admitted. — *Stephenson v. Higginson*, 638.

EXCEPTIONS. See BILL OF EXCEPTIONS, PRACTICE.

#### EXECUTOR.

1. A testator devised "all my estate, both real and personal, to E. E., his executors, administrators, and assigns, to and for the several uses, intents, and purposes following; that is to say"; — and then, after specifying various objects of his bounty, appointed "the said E. E. executor of this my last will and testament." The trusts of the will did not exhaust the estate: — *Held*, affirming a decree of Lord Chancellor Cottenham, that

E. E. did not become entitled, to the residuary personal estate for his own benefit, but was a trustee thereof for the widow and next of kin of the testator, according to the Statute of Distributions.

*Dawson v. Clark*, 18 Ves. 247, affirmed. — *Ellcock v. Mapp*, 492.

2. The rule in such a case is, that where there appears a "plain implication or strong presumption" that the testator, by naming an executor, meant only to give the office of executor, and not the beneficial interest, the person named shall be considered a trustee for the next of kin of the undisposed surplus. — *Id. ib.*, 509, note. See 11 Geo. IV. and 1 Wm. IV. c. 40.

**FOREIGN LAW.** See EVIDENCE.

**FRAUD.** See EQUITY, PLEADING.

**FRENCH CLAIMS.**

A., a British subject, claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first French Revolution. The governments of England and France entered into conventions respecting compensation to be afforded to British subjects. The English government received all the money agreed upon between the two governments as the amount of compensation, and undertook to satisfy all the claimants. An Act of Parliament was passed declaring how claims were to be preferred and liquidated. A. presented his claim to commissioners appointed under the \*Act, and his 913 \* claim was rejected. After payment of the claims which were established to the satisfaction of the commissioners, a surplus remained, which, according to one of the provisions of the Act, was paid over to the Lords of the Treasury. A. proceeded to make his claim afresh \* under a petition of right: — *Held*, that he had no remedy except under the provisions of the statute. — *De Bode v. The Queen*, 449.

**HEIR AT LAW.**

1. There is no absolute rule in a Court of Equity requiring that Court, as of course, to grant a second trial in an issue of *devisavit vel non*, when the Judge in Equity is satisfied that no new light could be thrown on the subject by a further investigation. — *McGregor v. Topham*, 132.
2. Though there may be an outstanding legal estate, which compels the heir at law to come into Equity, he cannot, on that account, claim a right to have the issue tried a second time, if the Court, in the exercise of its discretion, should deem the first verdict satisfactory. — *Id. ib.*
3. In every such issue the Court of Equity requires that all the attesting witnesses to a will shall, if it is possible to procure their attendance, be examined. — *Id. ib.*

**HOUSE OF LORDS.** See APPEAL, PRACTICE.

1. A judgment of the House of Lords is conclusive, and cannot be reversed or corrected, except by Act of Parliament. — *Tommey v. White*, 49.
2. This House is at liberty, without regard to the form of an appeal, or the points raised upon it, to put questions of law to the Judges. — *Bright v. Hutton*, 341.
3. *Quære*. Whether this House, like any other court of justice, may, in a subsequent case, overrule a previous decision of its own. — *Id. ib.*



4. The Judges were required to answer a question put by the House. One of them differed from the rest. The opinions of the majority were stated by one of their number, and, in the statement, the principle on which the dissentient Judge formed his opinion was set forth to his satisfaction. The House did not require him to state his reasons at length. — *Salmon v. Webb*, 510.
5. An application to advance an appeal for hearing must be made to the Appeal Committee, and not to the House. — *Birch v. Joy*, 565.
6. The Lords allowed the opinion of a learned Judge, who had been present at the hearing of the cause, but who was \*unable to attend when the Judges' opinions were delivered, to be read by one of his brethren; but it was expressly declared that this could not be done as a matter of course. — *Stephenson v. Higginson*, 638.

INTEREST OF A JUDGE.

1. A public company, which was incorporated, filed a bill in equity against a landowner, in a matter largely involving the interests of the company. The Lord Chancellor had an interest as a shareholder in the company to the amount of several thousand pounds, a fact which was unknown to the defendant in the suit. The cause was heard before the Vice-Chancellor, who granted the relief sought by the company. The Lord Chancellor, on appeal, affirmed the order of the Vice-Chancellor: — *Held*, that the Lord Chancellor was disqualified, on the ground of interest, from sitting as Judge in the cause, and that his decree was, therefore, voidable, and must, consequently, be reversed. — *Dimes v. Grand Junction Canal Company*, 759.
2. *Held*, also, that the Vice-Chancellor is, under the 53 Geo. III. c. 24, a Judge subordinate to, but not dependent on, the Lord Chancellor, and that consequently the disqualification of the Lord Chancellor did not affect him; but that his decree might be made the subject of appeal to this House. — *Id. ib.*
3. Before a decree made by the Vice-Chancellor can be appealed against, it is required to be enrolled. The enrolment is the act of the Lord Chancellor: — *Held*, that the act of enrolment, though performed by a Lord Chancellor disqualified by interest from adjudicating in the cause, was not affected by his disqualification, but was valid for the purpose of bringing up the appeal to this House. — *Id. ib.*

IRISH JURY. See JURYMEN.

ISSUE. See PRACTICE.

JURYMAN.

1. A town councillor is, by the 3 & 4 Vict. c. 108, disqualified from being a special jurymen. The name of a town councillor stood on a special jury-list after it had been reduced: — *Held*, that under the Irish Jury Act, 3 & 4 Wm. IV. c. 91, he was liable to challenge for this disqualification when about to be sworn. — *Barrett v. Long*, 395.
2. The right of challenge against a jurymen is a common-law right, which cannot be taken away except by the express \*terms of a statute; and *quære*, whether it is taken away by the 3 & 4 Wm. IV. c. 91, except in cases where corporate bodies are parties, and kindred or affinity with a member of the corporate body is the ground of challenge. — *Id. ib.*

3. It is not taken away by the effect of the 3 & 4 Wm. IV. c. 91, in respect of a disqualification created since that statute, and where a challenge, in respect of such disqualification, was made after reducing a special jury, it was held not to be necessary to allege that the disqualification had arisen since the jury was reduced. — *Id. ib.*

**LEASE.**

1. A lease of alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached: — *Held*, that the coal pillars could not be removed. — *Glasgow (Earl) v. Hurler Alum Company*, 25.
2. Where a lease contains a personal covenant for the payment of rent, and the lease is surrendered, the personal covenant is independent of the estate in the property, and, so far as relates to rent previously due, is not affected by the surrender; but the lessor remains a specialty creditor for the rent which accrued due before the surrender. — *Attorney-General v. Cox*, 240.

**LIBEL.** See EVIDENCE, PLEADING.

**LONDON TITHES.** See TITHES.

**MARRIAGE (SETTLEMENT UPON).** See REGISTRATION ACTS.

**MINES.**

A lease of alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached: — *Held*, that the coal pillars could not be removed. — *Glasgow (Earl) v. The Hurler Alum Company*, 25.

\* **MORTGAGE.**

\* 916

1. A mortgagor represented to an intending purchaser that the estate was only liable to a mortgage for 20,000*l.* to G. and Co., an additional sum of 10,000*l.* being secured on the mortgagor's personal property. The whole sum had in fact been originally secured on the land, and G. and Co. denied that they had ever done any thing to part from their security on the land. After the death of the mortgagor, G. and Co. filed a bill of foreclosure, and obtained from the purchaser the whole 30,000*l.*: — *Held*, that as between the purchaser and the executors of the mortgagor, the representations made by the mortgagor to the intending purchaser were equivalent to a contract with him, and the personal property of the mortgagor was liable to the extent of the 10,000*l.* — *Attorney-General v. Cox*, 240.
2. C. and Co. were legal mortgagees and specialty creditors for a sum of 30,000*l.* on Y.'s estate. Certain official persons acting as trustees for the Crown paid off this debt, and received an assignment of the mortgage, and of a covenant therein contained, with liberty to sue upon it, in trust

for the Crown :— *Held*, that the Crown was legal mortgagee and speciality creditor for the 30,000*l.* originally due to C. and Co. — *Id. ib.*

3. It is not a rule of equity, that upon the purchase of property subject to encumbrances, for its full value, the vendor is bound to apply the purchase money in payment of the encumbrances according to their priorities. Such a duty can only be the result of express agreement or of a contract to be implied from the circumstances of the case. — *Id. ib.*
4. Where a lease contains a personal covenant for the payment of rent, and the lease is surrendered, the personal covenant is independent of the estate in the property mortgaged, and is not affected by its surrender or other determination. The lessor, therefore, remains a speciality creditor for the rent which accrued due before the surrender. — *Id. ib.*

NEW TRIAL. See HEIR AT LAW, PRACTICE.

NOTICE. See VESTRY.

1. A debtor assigned his house and business in trust for payment of his debts, retaining to himself the management of the business, under the superintendence of the trustees, who, on his failing to perform his covenants in the trust deed, were thereby empowered, after having given him
- \* 917 \*three months' notice, to sell the house and business. Such notice was given, but waived by consent of the creditors and trustees, assembled at a general meeting :— *Held*, that a sale afterwards made by the trustees, without further notice, was unauthorised and unlawful — *Tomney v. White*, 49.
2. A., a landowner, through whose estate a part of a projected railway was to pass, became a party to a deed with the projectors of the railway by which he covenanted to withdraw his opposition to their bill and to oppose a rival bill, and they covenanted to pay him a certain sum of money in case their bill should pass within six months from the date of the deed, or to pay him a different sum if the rival bill should pass within eighteen months from the date of the deed. It was then provided that if the bill of these projectors should not be passed into a law within six months from the date of the agreement, either party might put an end to the agreement by a notice. The deed then contained a covenant on the part of these projectors, by which they agreed, if the two companies should be amalgamated, to pay a certain sum within three months after such amalgamation. The deed was dated on the 16th of March, 1846. The two companies were amalgamated in June, 1846 ; but no bill ever passed at the instance of these projectors alone. In November, 1846, these projectors gave a notice to put an end to the agreement. A. declared in covenant against these projectors, on that clause of the deed by which he was to receive a sum of money within three months after the amalgamation of the companies. The defendants pleaded that their bill had never passed into a law, that at the end of six months they had given notice to put an end to the agreement, and that they had not taken the plaintiff's land : — *Held*, that this plea was no answer to the action. — *Capper v. Lindsey (Earl)*, 293.

PEERAGE.

An Irish earldom was created, and a holder of that earldom was afterwards

created a viscount of the United Kingdom; the patent creating the viscounty described the grantee by the name and title of the Irish earldom. On the death of one holder of these titles his eldest son received a writ of summons to attend the House of Peers as an English viscount. He did so, and took his seat as a viscount. He subsequently petitioned to have his claim to vote for \* representative peers of Ireland allowed, and it was allowed. After his death his son received a writ of summons as an English viscount, and took his seat in that character. He then petitioned to be admitted to vote for representative peers of Ireland in virtue of the Irish earldom. The petition came before the Committee for Privileges. The patents creating the Irish earldom and the English viscounty, the writ of summons to the previous viscount, and the entry on the journals showing that he had taken his seat, and likewise the resolution of the Committee for Privileges admitting his claim to vote for representative peers, were all proved: — *Held*, that this was not sufficient to establish the claim of the present claimant; that the evidence must be such as would of itself, if the claim was now made without reference to any previous claim, be sufficient to establish it.

Such evidence not being producible at the moment, the consideration of the claim was adjourned. — *The Earl of Donoughmore's Claim*, 822.

**PEER.** See AGREEMENT.

**PETITION OF RIGHT.**

A., a British subject, claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first French revolution. The governments of England and France entered into conventions respecting compensation to be afforded to British subjects. The English government received all the money agreed upon between the two governments as the amount of compensation, and undertook to satisfy all the claimants. An Act of Parliament was passed declaring how claims were to be preferred and liquidated. A. presented his claim to commissioners appointed under the Act, and adopted the modes of proceeding provided by it: his claim was rejected. After payment of the claims which were established to the satisfaction of the commissioners, a surplus remained, which, in accordance with one of the provisions of the Act, was paid over to the Lords of the Treasury. A. proceeded to make his claim afresh under a petition of right: — *Held*, that he had no remedy except under the provisions of the statute. — *Be Bode v. The Queen*, 449.

**PLEADING.** See AGREEMENT.

1. The 28 Hen. VIII. c. 11, § 3, gives the "tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and \* all other whatsoever revenues, casualties, or profits, certain and uncertain, afferring or belonging to any" dignity, prebend, or benefice therein mentioned, which shall accrue between the occurrence of a vacancy and a new appointment, to the appointee. The 5 & 6 Wm. IV. c. 30, directs the profits of dignities or benefices, without cure of souls, becoming vacant during the existence of a certain ecclesiastical commission, to be paid to the treasurer of Queen Anne's Bounty, who is to keep an account of the

receipts and expenses, and retain the balance until he shall be otherwise ordered "by competent authority." By a subsequent statute the Crown is declared entitled to appoint, notwithstanding the existence of the commission in question, three persons to certain prebends therein named. One of these appointees, having duly demanded from the treasurer of Queen Anne's Bounty the profits received by him during the vacancy, brought an action of money had and received, to recover them. A special verdict (on a verdict found in his favour) declared these to be "the net profits of the prebend": — *Held*, that a judgment for the plaintiff given on this verdict could not be sustained, because it did not distinguish the sources from which these profits might arise, nor show whether they were derived from the *corpus* of the prebend to which he was individually entitled, or from sums due to him in respect of his share of the funds of the corporation aggregate, of which, as prebendary, he was a member. — *Reporton v. Hodgson*, 72.

2. A plea which does not merely raise an objection to a particular form of proceeding, leaving it to the plaintiff to proceed in a different form at another time, but which, if allowed, entirely bars the plaintiff from his remedy, is a peremptory and not a dilatory plea, within the 6 Geo. IV. c. 120, § 5, and a decree thereon may be the subject of appeal to this House. — *Geils v. Geils*, 280.

A Scotchman was married in England to an Englishwoman, and then returned to Scotland, where he was domiciled. Some years afterwards, the wife quitted Scotland and returned to England, where she lived separate from her husband. He came to England, and instituted proceedings in the Arches Court for a restitution of conjugal rights. The wife, in her responsive allegations, charged him with adultery, and that charge prayed for a divorce *à mensâ et thoro*. Judgment was given in her favour. The husband returned \* to Scotland, where the wife instituted a suit for divorce *à vinculo*. The husband pleaded the proceedings in the Arches as a bar to further proceedings in Scotland: — *Held*, that this plea raised a peremptory or substantial defence, and that a judgment thereon might be made the subject of appeal to this House. — *Id. ib.*

\* 920

3. In an action for a libel in a Dublin newspaper, the first count, after the usual prefatory averments, proceeded thus: "What possessed Lord H. (meaning thereby the said Lord Lieutenant of Ireland), if he knew any thing about the country, or was not under the spell of vile and treacherous influence, to make his first visit, and that carefully puffed, to Long's, the coachmaker (meaning thereby the said plaintiff), the other day? If mere trade was his (meaning thereby the said Lord Lieutenant's) object, he had several respectable houses open to him (meaning thereby the house and place of business of the said plaintiff was not respectable, and that the said visit was paid thereto for political objects)": — *Held*, that the 'innuendo did not enlarge the sense of these words, which were fully capable of bearing the meaning given to them. — *Barrett v. Long*, 395.

The third count repeated the same words, and accompanied them with the

following certificate: "BEARING WITNESS, that the above is a true and correct copy of the said petition, as the same was presented to the said court, and that the said petition was duly read and considered by the said court, and that the said court has ordered that the said petition should be granted, and that the said court has appointed a committee to inquire into the said petition, and to report thereon to the said court at the next sitting of the said court." — *Id.* That the words were contained in the petition, and that the petition was duly read and considered by the said court, and that the said court has ordered that the said petition should be granted, and that the said court has appointed a committee to inquire into the said petition, and to report thereon to the said court at the next sitting of the said court. — *Id.*

4. A vestry duly assembled by notice for that purpose, on the 12th of August, 1839, resolved: "That a plan of the sinking of the pound be made, and the same be duly made and laid, and a rate be levied thereon." This resolution was signed by the justices, and a vestry was then held, at which the persons attending was not at that time a vestryman. The plan was then made, and the estimate of the assessments required by the 6 & 7 Wm. IV. c. 36, Particular Assessments Act, was prepared and signed at that vestry. It was resolved: that the vestry meet be summoned for the 1st of September, to elect a director of the poor in the place of Mr. A., and the vestry then adjourned to the 1st of September. A general meeting of the vestry was held on the 1st of August, when the minutes of the last meeting were read and confirmed, and other business was transacted. On the 1st of September there was a general meeting of the vestrymen, pursuant to adjournment from the 1st of August, when the minutes of the last vestry were read and confirmed, and the vestry was occupied with hearing applications from poor parishioners for relief from payment of the poor rate. This meeting adjourned to the 5th of September. On the 5th of September, another general meeting of the vestry was held, when the minutes of the last vestry were read and confirmed: the vestry was occupied as before, and adjourned to the 14th. On the 14th of September, the vestrymen again met, having received a summons: which, however, did not state the purpose of the intended meeting: and four volumes, arranged in continuous alphabetical order, like one book, were produced, containing the particulars of the assessment required by the 6 & 7 Wm. IV. c. 36, and the last of these books was duly signed, and the rate thus completed was allowed by the justices. In replevin for seizing the plaintiff's goods under a distress for the rate thus made, an avowry alleged that a poor rate had been made after the passing of a certain local Act, and before the taking of the said goods, and whilst the property of the plaintiff was, and the plaintiff in respect thereof was, liable to be rated, to wit, on the 12th August, 1839: — *Held*, that this was a good avowry, and was proved by the facts above stated. — *Scadding v. Lorant*, 418.

5. A., who was a laboring man, receiving about 9s. a week, and totally uneducated, believing himself to have a contingent interest in an estate in fee simple, offered, in February, 1838, to sell his interest to B. B. applied to his attorneys, who advised, that as A.'s father might cut off the entail, A. had no saleable interest. B. declined the purchase; but shortly afterwards consented to lend money to A., and lent different sums, amounting

in the whole to 20*l.* A., on the 5th of May, 1838, executed a money-bond, conditioned in the penalty of 40*l.*, to secure the payment of 20*l.*, with five per cent. interest, on the 5th of November then next. A. was not called on for interest, nor did he hear of the matter again till the 22d of September, 1840, the day of his father's funeral. His father had not

- \* 922 interfered with the descent of the property, \* and A. had at that time become possessed of the estate. On the 24th of September, A. entered into an agreement to sell the estate to B., and that agreement was carried into execution by a conveyance on the following 10th of October. The bond, agreement, and conveyance were prepared by B.'s attorney, and executed at his office. A. had no attorney. The estate was sold considerably under its value. A. afterwards filed a bill alleging these facts, and praying that the deed of conveyance might be set aside as fraudulent and void: — *Held*, that the bill, as a bill charging fraud, was properly dismissed. — *Curson v. Belworthy*, 742.

*Quære*, whether A. might not have maintained a bill to set aside the conveyance as improvidently made and hastily executed. — *Id. ib.*

POWER. See CONVERSION OF ESTATE.

PRACTICE. See APPEAL, COSTS, HOUSE OF LORDS, PLEADING.

1. An exception which appeared on the face of the bill of exceptions, but had been abandoned in the Court below, was allowed to be argued in this House. — *Bain v. Whitehaven Railway Company*, 1.
2. A bill of exceptions was tendered to a Judge's direction, and, under the 55 Geo. III. c. 42, § 7, was signed by him at the time of the trial. The draft, thus prepared, was, some months afterwards, more formally drawn up, and was tendered to him for signature. He refused to sign it, unless a sentence, explaining his direction, was introduced into the bill, and the party excepting finally consented to its introduction. The bill of exceptions, with this explanation forming part of it, was presented to the Court: — *Held*, that the introduction of this explanation was highly irregular: but that, being on the record, the Court below, and this House, could only look to the record, and could neither receive an affidavit of the facts, nor examine the draft of the exceptions, originally prepared and signed. — *Glasgow (Earl) v. The Hurler Alum Company*, 25.
3. *Semble*, that a decree appealed from, but not adjudicated on further than the dismissing the appeal generally, may be included in a subsequent appeal. — *Tommey v. White*, 49.
4. *Semble* also, that decrees and orders which have not been enrolled may, after any length of time, on being enrolled, be brought under appeal with a recent order made in the same cause, and duly enrolled. — *Id. ib.*
5. A judgment of the House of Lords is conclusive, and cannot be reversed or corrected, except by Act of Parliament. — *Id. ib.*
- \* 923 \* 6. There is no absolute rule in a Court of Equity, requiring that Court, as of course, to grant a second trial in an issue of *devisavit vel non*, when the first trial has terminated against the heir at law, if the Judge in Equity is satisfied that no new light can be thrown on the subject by a further investigation. — *McGregor v. Topham*, 132.

7. Though there may be an outstanding legal estate, which compels the heir at law to come in as equity be carried on that account, claim a right to have the issue tried a second time, if the Court, in the exercise of its discretion, should deem the first verdict satisfactory. — *Id.* *ib.*
8. In every such issue the Court of Equity requires that all the attending witnesses it a will shall, if it is possible to procure their attendance, be examined. — *Id.* *ib.*
9. Where trustees are directed to pay a certain sum to a person for life, and are empowered according to their discretion to invest the trust funds out of which that sum is to arise, but decline or neglect to act, and the assistance of a Court of Equity is sought in order to carry into effect the purposes of the will, the Court will not, as a matter of course, exercise that discretion, but will only act on its established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding. — *Pendergast v. Pendergast*, 19.
10. The costs of an appeal were ordered to come out of the estate, but the trustee having unnecessarily printed certain documents for the hearing of the appeal, the costs of such printing were disallowed. — *Id.* *ib.*
11. This House, in overruling exceptions which had been allowed in the Court below, but which ought to have been overruled there, gives the costs in the Court below. — *Attorney-General v. Carr*, 240.
12. Where a petition to dismiss an appeal for incompetency has been directed by the Appeal Committee to be argued at the bar of the House, the counsel for the petitioner is entitled to begin. — *Gill v. Gill*, 250.
13. The petition was dismissed, but the costs were reserved. — *Id.* *ib.*
14. In a suit for a divorce *à mens et thoro* the wife obtained judgment in the Court below, with costs. That judgment was reversed by the Lords, on the ground that the remedy sought was not the proper one; but the Interlocutor was \* allowed to stand so far as it gave the \* 924 wife the costs in the Court below. — *Patterson v. Patterson*, 308.
15. The wife, however, was not allowed the costs of the appeal. *Query*. — *Id.* *ib.*
16. A decree was made in 1847, directing a reference to the Master to make certain calculations on bases laid down in that decree. The decree was not then appealed against: the inquiry took place in the Master's office, and he made his report, which the defendants in the suit excepted to; these exceptions were overruled, and the report confirmed; but no costs were given on either side. After all these proceedings had taken place, the defendants appealed against the decree itself. The decree was reversed, and the cause remitted, with directions; but no order was made as to the costs incurred in the Court below between the date of the decree and of the appeal, the Court below being left to deal with them as it might think fit. — *Blackwall Railway Company v. Letts*, 471.
17. The House, in disposing of a case where there were to be calculations of payments on one side and of interest on the other, laid down certain principles, and desired the parties on both sides to furnish an agreed statement of facts as to the sums to which these principles were to be applied. The House required this statement of sums to be delivered in before



- the Minutes of the Order of the House were given to the parties, and refused to hear counsel on the subject of this statement and of the Minutes. — *Birch v. Joy*, 565.
18. An application to advance an appeal for hearing must be made to the Appeal Committee, and not to the House. — *Id. ib.*
19. Where a party appealed to the House against a portion of a decree which had been made in the Court below, and that portion was affirmed, he was still at liberty (if within time) to appeal against the other portion of the same decree. — *Id. ib.*
20. The Lords allowed the opinion of a learned Judge, who had been present at the hearing of the cause, but who was unable to attend when the Judges' opinions were delivered, to be read by one of his brethren; but it was expressly declared that this could not be done as a matter of course. — *Stephenson v. Higginson*, 638.
21. In an appeal from a decree in the Court of Chancery, where no one appeared for the appellant, but counsel did appear for the respondent, the appeal was, without the respondent's counsel being called on, dismissed with costs. — *Martin v. D'Arcy*, 698.
- \* 925 \* 22. The name of a person who had purchased shares in a joint stock bank was, after the stoppage of that bank, placed on the list of contributories, but only from the date at which he made the purchase. An appeal was presented by the official managers against this qualification of his liability. When the case was called on, this qualification was, by agreement, struck out, and the order of the Court below varied in that respect. — *Henderson v. Sanderson*, 698.
23. In a writ of error where no one appeared for the plaintiff in error, the counsel for the defendant in error was required to state the nature of the case, and the judgment of the Court below was then affirmed with costs. — *Jones v. Cannock*, 700.
24. An Irish earldom was created, and a holder of that earldom was afterwards created a viscount of the United Kingdom; the patent granting the viscounty described the grantee by the name and title of the Irish earldom. On the death of one holder of these titles his eldest son received a writ of summons to attend the House of Peers as an English viscount. He did so, and took his seat as a viscount. He subsequently petitioned to have his claim to vote for representative peers of Ireland allowed, and it was allowed. After his death, his son received a writ of summons as an English viscount, and took his seat in that character. He then petitioned to be admitted to vote for representative peers of Ireland in virtue of the Irish earldom. The petition came before the Committee for Privileges. The patents creating the Irish earldom and the English viscounty, the writ of summons to the previous viscount, and the entry on the Journals showing that the preceding peer had taken his seat, and likewise the resolution of the Committee for Privileges admitting his claim to vote for representative peers, were all proved: — *Held*, that this was not sufficient to establish the title of the present claimant; that the evidence must be such as would of itself, if the claim was now made without reference to any previous claim, be sufficient to establish it. Such evidence

not being producible at the moment, the consideration of the claim was adjourned. — *The Earl of Donoughmore's Claim*, 822.

## PREBEND.

The 28 Hen. VIII. c. 11, § 3, gives the "tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties, or profits, certain and uncertain, affering or belonging to any" dignity, \* prebend, or benefice therein mentioned, which \* 926 shall accrue between the occurrence of a vacancy and a new appointment, to the appointee. The 5 & 6 Wm. IV. c. 30, directs the profits of dignities or benefices without cure of souls, becoming vacant during the existence of a certain ecclesiastical commission, to be paid to the treasurer of Queen Anne's Bounty, who is to keep an account of the receipts and expenses, and retain the balance until he shall be otherwise ordered "by competent authority." By a subsequent statute the Crown is declared entitled to appoint, notwithstanding the existence of the commission in question, three persons to certain prebends therein named. One of these appointees, having duly demanded from the treasurer of Queen Anne's Bounty the profits received by him during the vacancy, brought an action for money had and received, to recover them. A special verdict (on a verdict found in his favour) declared these to be "the net profits of the prebend": — *Held*, that a judgment for the plaintiff given on this verdict could not be sustained, because it did not distinguish the sources from which these profits might arise, nor show whether they were derived from the *corpus* of the prebend to which he was individually entitled, or from sums due to him in respect of his share of the funds of the corporation aggregate, of which, as prebendary, he was a member. — *Repton v. Hodgson*, 72.

## PRINCIPAL AND SURETY.

A variance in the agreement to which a surety has subscribed, which variance has been made without the surety's knowledge or consent, and which may prejudice him, or amount to the substitution of a new agreement for a former one, will discharge the surety, though the original agreement, notwithstanding such variance, may be that on which the liability is substantially incurred. — *Bonar v. Macdonald*, 226.

A. became surety for B.'s conduct as a clerk in a bank. B. was subsequently appointed to a better situation in a branch of the same bank, and A. extended his suretyship to this new situation; B. afterwards, while remaining in the same situation, undertook, on having his salary raised, to become liable to one fourth of the losses on discounts. No communication of this new arrangement was made to A. B. allowed a customer considerably to overdraw his accounts, and thereby the bank lost a sum of money: — *Held*, that the surety could not be called on to make good this loss, though \* it fell within the terms of the original agreement, as the fresh \* 927 arrangement was the substitution of a new agreement for the former one, and A. was thereby discharged. — *Id. ib.*

PROCTOR AND REGISTRAR. See ECCLESIASTICAL COURTS.

## PROMISSORY NOTES.

A. made his promissory note payable on demand, with interest, in favour of

B. and C., the executors of D. A. was, with several other relatives, to be entitled to certain benefits, under D.'s will, upon the coming of age of the youngest legatee named in the will. By an agreement made between the legatees, the executors were authorised to lend the funds in their hands on personal security; and a part of these funds having been lent to A. (as well as to the other legatees), he gave the executors the note in question. By the agreement it was settled that the notes given to the executors should not be sued on till the youngest legatee had arrived at the age mentioned in the will. The executors did not sign this agreement; but when it had been signed by the other parties, took it into their possession. The executors brought the action while the legatee in question was alive, and before he had attained the specified age. A. pleaded the agreement as an answer to the action, averring that plaintiffs accepted and received the note on the terms and conditions of the agreement, and that the youngest legatee was still under age. At the trial the agreement was proved: — *Held*, that the plea was bad in substance, for that the agreement was collateral, and was not between the same parties as the note. — *Salmon v. Webb*, 510.

**RAILWAY COMPANY.** See CONTRIBUTORY WINDING-UP ACTS.

- A company for making a railway from Dublin to Mullingar was incorporated by an Act of Parliament passed in July, 1845 (8 & 9 Vict. c. 119), under the name of "The Midland Great Western Railway Company of Ireland." Some of its directors provisionally registered another company for making a railway from Mullingar to Galway, to be called "The Galway and Mullingar Junction Railway Company." Three months afterwards this name was altered at the Registration Office to "The Midland Great Western Railway Company of Ireland (extension from Mullingar to Galway)." Most of the directors of the two companies were the same. L. applied for and received scrip and certificates in the extension company, and paid deposits thereon, and received receipts headed with the altered name,
- \* 928 and he \* signed the shareholders' agreement and parliamentary contract. The Midland Great Western presented, in its own name and under its corporate seal, a petition to Parliament for an Act to make a railway from Mullingar to Galway, undertaking at its own expense to make the railway. The Act which was passed upon this petition, in July, 1846 (9 & 10 Vict. c. 224), only gave authority to make the railway from Mullingar to Athlone, or but a part of the distance. The directors had power under the Act to raise the necessary sums, "by contributions among themselves or by the admission of other parties." The additional capital required for the extension was directed to form "part of the general and original capital of the company"; and the provisions of the re-voiced Act (that of 1845) were to extend to and be read with the new Act. The expression "The Company," in the new Act, was declared to mean the Midland Great Western Company. In September, 1846, at a meeting of the directors of the Midland Great Western Company, a resolution was passed stating on what terms the holders of the extension scrip should be entitled to certificates in the joint company, and another resolution approving of and confirming those terms. At that meeting the seal of the

Midland Great Western Company was affixed to the shareholders' book, which, however, did not then contain the names of the shareholders in the extension line. The latter were added in March, 1847, when one of ~~them~~ that of the defendant, was inserted. Three calls were made; the first was dated previous to the insertion of the extension subscribers in the shareholders' book, the two others after that insertion. An action was brought for these calls: — *Held*, that the Act did not amalgamate the two companies; and that even if the directors possessed a power of amalgamation, the resolution of September, 1846, was not an exercise of that power so as to render the defendant liable to an action for any one of the calls at the suit of the Midland Great Western Company. — *Midland Great Western (Ir.) Company v. Leech*, 872.

RAILWAY. See AGREEMENT.

RAILWAY COMPANIES' BOOKS. See EVIDENCE.

RATE. See VESTRY.

REGISTRAR AND PROCTOR. See ECCLESIASTICAL COURTS.

REGISTRATION (IRISH) ACTS.

1. Under the Irish Registration Act (6 Anne, c. 2), an equity in a \*grant \*929 which is registered will prevail against the right even of a *bonâ fide* purchaser to whom the original grantor has subsequently sold part of the property comprised in the registered deed. — *Mill v. Hill*, 828.
2. A deed contained recitals which described two persons as concurring in settling property to which they were "respectively entitled." It afterwards contained a grant to trustees of a certain part of this property, as made by one of these persons, when in fact that part belonged to the other. The memorial of the deed described both as the granting parties. This description was not one of the things required by the statute: — *Held*, not to vitiate the effect of the memorial under the Registration Act. — *Id. ib.*
3. In 1830, a settlement of certain property, held under renewable leases, was made in favour of A. In 1831, A., being about to marry, made a settlement of this property for the uses of the marriage. The deed of 1830 was not registered. The deed of 1831 was registered. In 1840, A., being in actual possession, sold to B., and B., who had no actual notice of the settlement of 1831, entered into possession, and made alterations in the premises. After the death of A., his son, who was entitled under the settlement of 1831, filed a bill against B. to set aside the sale, and for an account and for waste: — *Held*, that it was not necessary to register the deed of 1830; that the registered deed prevailed against the *bonâ fide* purchase of B., and that the Court below had properly declared him to stand possessed of the leases as a trustee for the parties beneficially interested under the settlement of 1831. — *Id. ib.*
4. But held also, that he was entitled to indemnity against the covenants in the leases which he was thus declared to hold as trustee; that an inquiry ought to be made as to alleged improvements and as to alleged waste; and that he was entitled to be allowed the benefits of those improvements; and that, being a *bonâ fide* purchaser, without misconduct, he ought not to be charged with costs. — *Id. ib.*

for the Crown :— *Held*, that the Crown was legal mortgagee and speciality creditor for the 30,000*l.* originally due to C. and Co. — *Id. ib.*

3. It is not a rule of equity, that upon the purchase of property subject to encumbrances, for its full value, the vendor is bound to apply the purchase money in payment of the encumbrances according to their priorities. Such a duty can only be the result of express agreement or of a contract to be implied from the circumstances of the case. — *Id. ib.*
4. Where a lease contains a personal covenant for the payment of rent, and the lease is surrendered, the personal covenant is independent of the estate in the property mortgaged, and is not affected by its surrender or other determination. The lessor, therefore, remains a speciality creditor for the rent which accrued due before the surrender. — *Id. ib.*

NEW TRIAL. See HEIR AT LAW, PRACTICE.

NOTICE. See VESTRY.

1. A debtor assigned his house and business in trust for payment of his debts, retaining to himself the management of the business, under the superintendence of the trustees, who, on his failing to perform his covenants in the trust deed, were thereby empowered, after having given him
- \* 917 \*three months' notice, to sell the house and business. Such notice was given, but waived by consent of the creditors and trustees, assembled at a general meeting :— *Held*, that a sale afterwards made by the trustees, without further notice, was unauthorised and unlawful. — *Tomney v. White*, 49.

2. A., a landowner, through whose estate a part of a projected railway was to pass, became a party to a deed with the projectors of the railway by which he covenanted to withdraw his opposition to their bill and to oppose a rival bill, and they covenanted to pay him a certain sum of money in case their bill should pass within six months from the date of the deed, or to pay him a different sum if the rival bill should pass within eighteen months from the date of the deed. It was then provided that if the bill of these projectors should not be passed into a law within six months from the date of the agreement, either party might put an end to the agreement by a notice. The deed then contained a covenant on the part of these projectors, by which they agreed, if the two companies should be amalgamated, to pay a certain sum within three months after such amalgamation. The deed was dated on the 16th of March, 1846. The two companies were amalgamated in June, 1846; but no bill ever passed at the instance of these projectors alone. In November, 1846, these projectors gave a notice to put an end to the agreement. A. declared in covenant against these projectors, on that clause of the deed by which he was to receive a sum of money within three months after the amalgamation of the companies. The defendants pleaded that their bill had never passed into a law, that at the end of six months they had given notice to put an end to the agreement, and that they had not taken the plaintiff's land :— *Held*, that this plea was no answer to the action. — *Capper v. Lindsey (Earl)*, 293.

PEERAGE.

An Irish earldom was created, and a holder of that earldom was afterwards

created a viscount of the United Kingdom; the patent creating the viscounty described the grantee by the name and title of the Irish earldom. On the death of one holder of these titles his eldest son received a writ of summons to attend the House of Peers as an English viscount. He did so, and took his seat as a viscount. He subsequently petitioned to have his claim to vote for \*representative peers of Ireland allowed, and it was allowed. After his death his son received a writ of summons as an English viscount, and took his seat in that character. He then petitioned to be admitted to vote for representative peers of Ireland in virtue of the Irish earldom. The petition came before the Committee for Privileges. The patents creating the Irish earldom and the English viscounty, the writ of summons to the previous viscount, and the entry on the journals showing that he had taken his seat, and likewise the resolution of the Committee for Privileges admitting his claim to vote for representative peers, were all proved: — *Held*, that this was not sufficient to establish the claim of the present claimant; that the evidence must be such as would of itself, if the claim was now made without reference to any previous claim, be sufficient to establish it.

Such evidence not being producible at the moment, the consideration of the claim was adjourned. — *The Earl of Donoughmore's Claim*, 822.

PEER. See AGREEMENT.

PETITION OF RIGHT.

A., a British subject, claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first French revolution. The governments of England and France entered into conventions respecting compensation to be afforded to British subjects. The English government received all the money agreed upon between the two governments as the amount of compensation, and undertook to satisfy all the claimants. An Act of Parliament was passed declaring how claims were to be preferred and liquidated. A. presented his claim to commissioners appointed under the Act, and adopted the modes of proceeding provided by it: his claim was rejected. After payment of the claims which were established to the satisfaction of the commissioners, a surplus remained, which, in accordance with one of the provisions of the Act, was paid over to the Lords of the Treasury. A. proceeded to make his claim afresh under a petition of right: — *Held*, that he had no remedy except under the provisions of the statute. — *Be Bode v. The Queen*, 449.

PLEADING. See AGREEMENT.

1. The 28 Hen. VIII. c. 11, § 3, gives the "tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and \*all other whatsoever revenues, casualties, or profits, certain and uncertain, offering or belonging to any" dignity, prebend, or benefice therein mentioned, which shall accrue between the occurrence of a vacancy and a new appointment, to the appointee. The 5 & 6 Wm. IV. c. 30, directs the profits of dignities or benefices, without cure of souls, becoming vacant during the existence of a certain ecclesiastical commission, to be paid to the treasurer of Queen Anne's Bounty, who is to keep an account of the

receipts and expenses, and retain the balance until he shall be otherwise ordered "by competent authority." By a subsequent statute the Crown is declared entitled to appoint, notwithstanding the existence of the commission in question, three persons to certain prebends therein named. One of these appointees, having duly demanded from the treasurer of Queen Anne's Bounty the profits received by him during the vacancy, brought an action of money had and received, to recover them. A special verdict (on a verdict found in his favour) declared these to be "the net profits of the prebend": — *Held*, that a judgment for the plaintiff given on this verdict could not be sustained, because it did not distinguish the sources from which these profits might arise, nor show whether they were derived from the *corpus* of the prebend to which he was individually entitled, or from sums due to him in respect of his share of the funds of the corporation aggregate, of which, as prebendary, he was a member. — *Repton v. Hodgson*, 72.

2. A plea which does not merely raise an objection to a particular form of proceeding, leaving it to the plaintiff to proceed in a different form at another time, but which, if allowed, entirely bars the plaintiff from his remedy, is a peremptory and not a dilatory plea, within the 6 Geo. IV. c. 120, § 5, and a decree thereon may be the subject of appeal to this House. — *Geils v. Geils*, 280.

A Scotchman was married in England to an Englishwoman, and then returned to Scotland, where he was domiciled. Some years afterwards, the wife quitted Scotland and returned to England, where she lived separate from her husband. He came to England, and instituted proceedings in the Arches Court for a restitution of conjugal rights. The wife, in her responsive allegations, charged him with adultery, and that charge prayed for a divorce *à mensâ et thoro*. Judgment was given in her favour. The husband returned \* to Scotland, where the wife instituted a suit for divorce *à vinculo*. The husband pleaded the proceedings in the Arches as a bar to further proceedings in Scotland: — *Held*, that this plea raised a peremptory or substantial defence, and that a judgment thereon might be made the subject of appeal to this House. — *Id. ib.*

- \* 920 her favour. The husband returned \* to Scotland, where the wife instituted a suit for divorce *à vinculo*. The husband pleaded the proceedings in the Arches as a bar to further proceedings in Scotland: — *Held*, that this plea raised a peremptory or substantial defence, and that a judgment thereon might be made the subject of appeal to this House. — *Id. ib.*
3. In an action for a libel in a Dublin newspaper, the first count, after the usual prefatory averments, proceeded thus: "What possessed Lord H. (meaning thereby the said Lord Lieutenant of Ireland), if he knew any thing about the country, or was not under the spell of vile and treacherous influence, to make his first visit, and that carefully puffed, to Long's, the coachmaker (meaning thereby the said plaintiff), the other day? If mere trade was his (meaning thereby the said Lord Lieutenant's) object, he had several respectable houses open to him (meaning thereby the house and place of business of the said plaintiff was not respectable, and that the said visit was paid thereto for political objects)": — *Held*, that the 'innuendo did not enlarge the sense of these words, which were fully capable of bearing the meaning given to them. — *Barrett v. Long*, 395.

The third count repeated the same words, and accompanied them with the

following innuendo : " (meaning thereby, that the house of business of the said plaintiff was not a respectable house in the trade, and that the plaintiff himself was of such a character, that he would not be visited in the way of his trade and business except from some political, or party, or other improper motive) " :— *Held*, that the words were capable of the meaning thus attributed to them ; but that if the innuendo was more extensive than the words, it might be rejected as repugnant and void, and that the words, being libellous, were actionable without its aid. — *Id. ib.*

4. A vestry, duly assembled by notice for that purpose, on the 12th of August, 1839, resolved, " That a rate of one shilling in the pound be made, and the same is hereby made and laid, and is to be collected forthwith." This resolution was signed by the requisite number of vestrymen ; but one of the persons so acting was not at that time a vestryman *de jure*. The parish was so large that the estimate of the assessments required by the 6 & 7 Wm. IV. c. 96 (Parochial Assessments Act) could not be prepared and signed at that vestry. It was resolved " that the vestrymen be summoned for the 4th of September, to elect a director of the poor in the \* place of," &c., and the vestry then adjourned to the 4th of \* 921 September. A special meeting of the vestry was held on the 28th of August, when the minutes of the last meeting were read and confirmed, and other business was transacted. On the 4th of September there was a general meeting of the vestrymen, pursuant to adjournment from the 12th of August, when the minutes of the last vestry were read and confirmed, and the vestry was occupied with hearing applications from poor parishioners for relief from payment of the poor rate. This meeting adjourned to the 9th of September. On the 9th of September, another general meeting of the vestry was held, when the minutes of the last vestry were read and confirmed ; the vestry was occupied as before, and adjourned to the 14th. On the 14th of September, the vestrymen again met, having received a summons ; which, however, did not state the purpose of the intended meeting ; and four volumes, arranged in continuous alphabetical order, like one book, were produced, containing the particulars of the assessment required by the 6 & 7 Wm. IV. c. 96, and the last of these books was duly signed, and the rate thus completed was allowed by the justices. In replevin for seizing the plaintiff's goods under a distress for the rate thus made, an avowry alleged that a poor rate had been made after the passing of a certain local Act, and before the taking of the said goods, and whilst the property of the plaintiff was, and the plaintiff in respect thereof was, liable to be rated, to wit, on the 12th August, 1839 :— *Held*, that this was a good avowry, and was proved by the facts above stated. — *Scadding v. Lorant*, 418.
5. A., who was a laboring man, receiving about 9s. a week, and totally uneducated, believing himself to have a contingent interest in an estate in fee simple, offered, in February, 1838, to sell his interest to B. B. applied to his attorneys, who advised, that as A.'s father might cut off the entail, A. had no saleable interest. B. declined the purchase ; but shortly afterwards consented to lend money to A., and lent different sums, amounting



- in the whole to 20*l.* A., on the 5th of May, 1838, executed a money-bond, conditioned in the penalty of 40*l.*, to secure the payment of 20*l.*, with five per cent. interest, on the 5th of November then next. A. was not called on for interest, nor did he hear of the matter again till the 22d of September, 1840, the day of his father's funeral. His father had not
- \*922 interfered with the descent of the property, \* and A. had at that time become possessed of the estate. On the 24th of September, A. entered into an agreement to sell the estate to B., and that agreement was carried into execution by a conveyance on the following 10th of October. The bond, agreement, and conveyance were prepared by B.'s attorney, and executed at his office. A. had no attorney. The estate was sold considerably under its value. A. afterwards filed a bill alleging these facts, and praying that the deed of conveyance might be set aside as fraudulent and void: — *Held*, that the bill, as a bill charging fraud, was properly dismissed. — *Curson v. Belworthy*, 742.

*Quære*, whether A. might not have maintained a bill to set aside the conveyance as improvidently made and hastily executed. — *Id. ib.*

POWER. See CONVERSION OF ESTATE.

PRACTICE. See APPEAL, COSTS, HOUSE OF LORDS, PLEADING.

1. An exception which appeared on the face of the bill of exceptions, but had been abandoned in the Court below, was allowed to be argued in this House. — *Bain v. Whitehaven Railway Company*, 1.
2. A bill of exceptions was tendered to a Judge's direction, and, under the 55 Geo. III. c. 42, § 7, was signed by him at the time of the trial. The draft, thus prepared, was, some months afterwards, more formally drawn up, and was tendered to him for signature. He refused to sign it, unless a sentence, explaining his direction, was introduced into the bill, and the party excepting finally consented to its introduction. The bill of exceptions, with this explanation forming part of it, was presented to the Court: — *Held*, that the introduction of this explanation was highly irregular: but that, being on the record, the Court below, and this House, could only look to the record, and could neither receive an affidavit of the facts, nor examine the draft of the exceptions, originally prepared and signed. — *Glasgow (Earl) v. The Hurler Alum Company*, 25.
3. *Semble*, that a decree appealed from, but not adjudicated on further than the dismissing the appeal generally, may be included in a subsequent appeal. — *Tommey v. White*, 49.
4. *Semble* also, that decrees and orders which have not been enrolled may, after any length of time, on being enrolled, be brought under appeal with a recent order made in the same cause, and duly enrolled. — *Id. ib.*
5. A judgment of the House of Lords is conclusive, and cannot be reversed or corrected, except by Act of Parliament. — *Id. ib.*
- \*923 \*6. There is no absolute rule in a Court of Equity, requiring that Court, as of course, to grant a second trial in an issue of *devisavit vel non*, when the first trial has terminated against the heir at law, if the Judge in Equity is satisfied that no new light can be thrown on the subject by a further investigation. — *McGregor v. Topham*, 132.

7. Though there may be an outstanding legal estate, which compels the heir at law to come into equity, he cannot, on that account, claim a right to have the issue tried a second time, if the Court, in the exercise of its discretion, should deem the first verdict satisfactory. — *Id. ib.*
8. In every such issue the Court of Equity requires that all the attesting witnesses to a will shall, if it is possible to procure their attendance, be examined. — *Id. ib.*
9. Where trustees are directed to pay a certain sum to a person for life, and are empowered according to their discretion to invest the trust funds out of which that sum is to arise, but decline or neglect to act, and the assistance of a Court of Equity is sought in order to carry into effect the purposes of the will, the Court will not, as a matter of course, exercise that discretion, but will only act on its established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding. — *Prendergast v. Prendergast*, 19.
10. The costs of an appeal were ordered to come out of the estate, but the trustee having unnecessarily printed certain documents for the hearing of the appeal, the costs of such printing were disallowed. — *Id. ib.*
11. This House, in overruling exceptions which had been allowed in the Court below, but which ought to have been overruled there, gives the costs in the Court below. — *Attorney-General v. Cox*, 240.
12. Where a petition to dismiss an appeal for incompetency has been directed by the Appeal Committee to be argued at the bar of the House, the counsel for the petitioner is entitled to begin. — *Geils v. Geils*, 280.
13. The petition was dismissed, but the costs were reserved. — *Id. ib.*
14. In a suit for a divorce *à mensâ et thoro* the wife obtained judgment in the Court below, with costs. That judgment was reversed by the Lords, on the ground that the remedy sought was not the proper one; but the Interlocutor was \* allowed to stand so far as it gave the \* 924 wife the costs in the Court below. — *Paterson v. Paterson*, 308.
15. The wife, however, was not allowed the costs of the appeal. *Quære.* — *Id. ib.*
16. A decree was made in 1847, directing a reference to the Master to make certain calculations on bases laid down in that decree. The decree was not then appealed against; the inquiry took place in the Master's office, and he made his report, which the defendants in the suit excepted to; these exceptions were overruled, and the report confirmed; but no costs were given on either side. After all these proceedings had taken place, the defendants appealed against the decree itself. The decree was reversed, and the cause remitted, with directions; but no order was made as to the costs incurred in the Court below between the date of the decree and of the appeal, the Court below being left to deal with them as it might think fit. — *Blackwall Railway Company v. Letts*, 471.
17. The House, in disposing of a case where there were to be calculations of payments on one side and of interest on the other, laid down certain principles, and desired the parties on both sides to furnish an agreed statement of facts as to the sums to which these principles were to be applied. The House required this statement of sums to be delivered in before

the Minutes of the Order of the House were given to the parties, and refused to hear counsel on the subject of this statement and of the Minutes. — *Birch v. Joy*, 565.

18. An application to advance an appeal for hearing must be made to the Appeal Committee, and not to the House. — *Id. ib.*
19. Where a party appealed to the House against a portion of a decree which had been made in the Court below, and that portion was affirmed, he was still at liberty (if within time) to appeal against the other portion of the same decree. — *Id. ib.*
20. The Lords allowed the opinion of a learned Judge, who had been present at the hearing of the cause, but who was unable to attend when the Judges' opinions were delivered, to be read by one of his brethren; but it was expressly declared that this could not be done as a matter of course. — *Stephenson v. Higginson*, 638.
21. In an appeal from a decree in the Court of Chancery, where no one appeared for the appellant, but counsel did appear for the respondent, the appeal was, without the respondent's counsel being called on, dismissed with costs. — *Martin v. D'Arcy*, 698.
- \* 925 \* 22. The name of a person who had purchased shares in a joint stock bank was, after the stoppage of that bank, placed on the list of contributories, but only from the date at which he made the purchase. An appeal was presented by the official managers against this qualification of his liability. When the case was called on, this qualification was, by agreement, struck out, and the order of the Court below varied in that respect. — *Henderson v. Sanderson*, 698.
23. In a writ of error where no one appeared for the plaintiff in error, the counsel for the defendant in error was required to state the nature of the case, and the judgment of the Court below was then affirmed with costs. — *Jones v. Cannock*, 700.
24. An Irish earldom was created, and a holder of that earldom was afterwards created a viscount of the United Kingdom; the patent granting the viscounty described the grantee by the name and title of the Irish earldom. On the death of one holder of these titles his eldest son received a writ of summons to attend the House of Peers as an English viscount. He did so, and took his seat as a viscount. He subsequently petitioned to have his claim to vote for representative peers of Ireland allowed, and it was allowed. After his death, his son received a writ of summons as an English viscount, and took his seat in that character. He then petitioned to be admitted to vote for representative peers of Ireland in virtue of the Irish earldom. The petition came before the Committee for Privileges. The patents creating the Irish earldom and the English viscounty, the writ of summons to the previous viscount, and the entry on the Journals showing that the preceding peer had taken his seat, and likewise the resolution of the Committee for Privileges admitting his claim to vote for representative peers, were all proved: — *Held*, that this was not sufficient to establish the title of the present claimant; that the evidence must be such as would of itself, if the claim was now made without reference to any previous claim, be sufficient to establish it. Such evidence

not being producible at the moment, the consideration of the claim was adjourned. — *The Earl of Donoughmore's Claim*, 822.

## PREBEND.

The 28 Hen. VIII. c. 11, § 3, gives the "tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties, or profits, certain and uncertain, afferring or belonging to any" dignity, \* prebend, or benefice therein mentioned, which \* 926 shall accrue between the occurrence of a vacancy and a new appointment, to the appointee. The 5 & 6 Wm. IV. c. 30, directs the profits of dignities or benefices without cure of souls, becoming vacant during the existence of a certain ecclesiastical commission, to be paid to the treasurer of Queen Anne's Bounty, who is to keep an account of the receipts and expenses, and retain the balance until he shall be otherwise ordered "by competent authority." By a subsequent statute the Crown is declared entitled to appoint, notwithstanding the existence of the commission in question, three persons to certain prebends therein named. One of these appointees, having duly demanded from the treasurer of Queen Anne's Bounty the profits received by him during the vacancy, brought an action for money had and received, to recover them. A special verdict (on a verdict found in his favour) declared these to be "the net profits of the prebend": — *Held*, that a judgment for the plaintiff given on this verdict could not be sustained, because it did not distinguish the sources from which these profits might arise, nor show whether they were derived from the *corpus* of the prebend to which he was individually entitled, or from sums due to him in respect of his share of the funds of the corporation aggregate, of which, as prebendary, he was a member. — *Repton v. Hodgson*, 72.

## PRINCIPAL AND SURETY.

A variance in the agreement to which a surety has subscribed, which variance has been made without the surety's knowledge or consent, and which may prejudice him, or amount to the substitution of a new agreement for a former one, will discharge the surety, though the original agreement, notwithstanding such variance, may be that on which the liability is substantially incurred. — *Bonar v. Macdonald*, 226.

A. became surety for B.'s conduct as a clerk in a bank. B. was subsequently appointed to a better situation in a branch of the same bank, and A. extended his suretyship to this new situation; B. afterwards, while remaining in the same situation, undertook, on having his salary raised, to become liable to one fourth of the losses on discounts. No communication of this new arrangement was made to A. B. allowed a customer considerably to overdraw his accounts, and thereby the bank lost a sum of money: — *Held*, that the surety could not be called on to make good this loss, though \* it fell within the terms of the original agreement, as the fresh \* 927 arrangement was the substitution of a new agreement for the former one, and A. was thereby discharged. — *Id. ib.*

PROCTOR AND REGISTRAR. See ECCLESIASTICAL COURTS.

## PROMISSORY NOTES.

A. made his promissory note payable on demand, with interest, in favour of

B. and C., the executors of D. A. was, with several other relatives, to be entitled to certain benefits, under D.'s will, upon the coming of age of the youngest legatee named in the will. By an agreement made between the legatees, the executors were authorised to lend the funds in their hands on personal security; and a part of these funds having been lent to A. (as well as to the other legatees), he gave the executors the note in question. By the agreement it was settled that the notes given to the executors should not be sued on till the youngest legatee had arrived at the age mentioned in the will. The executors did not sign this agreement; but when it had been signed by the other parties, took it into their possession. The executors brought the action while the legatee in question was alive, and before he had attained the specified age. A. pleaded the agreement as an answer to the action, averring that plaintiffs accepted and received the note on the terms and conditions of the agreement, and that the youngest legatee was still under age. At the trial the agreement was proved: — *Held*, that the plea was bad in substance, for that the agreement was collateral, and was not between the same parties as the note. — *Salmon v. Webb*, 510.

**RAILWAY COMPANY.** See CONTRIBUTORY WINDING-UP ACTS.

A company for making a railway from Dublin to Mullingar was incorporated by an Act of Parliament passed in July, 1845 (8 & 9 Vict. c. 119), under the name of "The Midland Great Western Railway Company of Ireland." Some of its directors provisionally registered another company for making a railway from Mullingar to Galway, to be called "The Galway and Mullingar Junction Railway Company." Three months afterwards this name was altered at the Registration Office to "The Midland Great Western Railway Company of Ireland (extension from Mullingar to Galway)." Most of the directors of the two companies were the same. L. applied for and received scrip and certificates in the extension company, and paid deposits thereon, and received receipts headed with the altered name, and he \* signed the shareholders' agreement and parliamentary contract. The Midland Great Western presented, in its own name and under its corporate seal, a petition to Parliament for an Act to make a railway from Mullingar to Galway, undertaking at its own expense to make the railway. The Act which was passed upon this petition, in July, 1846 (9 & 10 Vict. c. 224), only gave authority to make the railway from Mullingar to Athlone, or but a part of the distance. The directors had power under the Act to raise the necessary sums, "by contributions among themselves or by the admission of other parties." The additional capital required for the extension was directed to form "part of the general and original capital of the company"; and the provisions of the re-voiced Act (that of 1845) were to extend to and be read with the new Act. The expression "The Company," in the new Act, was declared to mean the Midland Great Western Company. In September, 1846, at a meeting of the directors of the Midland Great Western Company, a resolution was passed stating on what terms the holders of the extension scrip should be entitled to certificates in the joint company, and another resolution approving of and confirming those terms. At that meeting the seal of the

Midland Great Western Company was affixed to the shareholders' book, which, however, did not then contain the names of the shareholders in the extension line. The latter were added in March, 1847, when one of them, that of the defendant, was inserted. Three calls were made; the first was dated previous to the insertion of the extension subscribers in the shareholders' book, the two others after that insertion. An action was brought for these calls:—*Held*, that the Act did not amalgamate the two companies; and that even if the directors possessed a power of amalgamation, the resolution of September, 1846, was not an exercise of that power so as to render the defendant liable to an action for any one of the calls at the suit of the Midland Great Western Company.—*Midland Great Western (Ir.) Company v. Leech*, 872.

**RAILWAY.** See AGREEMENT.

**RAILWAY COMPANIES' BOOKS.** See EVIDENCE.

**RATE.** See VESTRY.

**REGISTRAR AND PROCTOR.** See ECCLESIASTICAL COURTS.

**REGISTRATION (IRISH) ACTS.**

1. Under the Irish Registration Act (6 Anne, c. 2), an equity in a \*grant \*929 which is registered will prevail against the right even of a *bonâ fide* purchaser to whom the original grantor has subsequently sold part of the property comprised in the registered deed.—*Mill v. Hill*, 828.
2. A deed contained recitals which described two persons as concurring in settling property to which they were "respectively entitled." It afterwards contained a grant to trustees of a certain part of this property, as made by one of these persons, when in fact that part belonged to the other. The memorial of the deed described both as the granting parties. This description was not one of the things required by the statute:—*Held*, not to vitiate the effect of the memorial under the Registration Act.—*Id. ib.*
3. In 1830, a settlement of certain property, held under renewable leases, was made in favour of A. In 1831, A., being about to marry, made a settlement of this property for the uses of the marriage. The deed of 1830 was not registered. The deed of 1831 was registered. In 1840, A., being in actual possession, sold to B., and B., who had no actual notice of the settlement of 1831, entered into possession, and made alterations in the premises. After the death of A., his son, who was entitled under the settlement of 1831, filed a bill against B. to set aside the sale, and for an account and for waste:—*Held*, that it was not necessary to register the deed of 1830; that the registered deed prevailed against the *bonâ fide* purchase of B., and that the Court below had properly declared him to stand possessed of the leases as a trustee for the parties beneficially interested under the settlement of 1831.—*Id. ib.*
4. But held also, that he was entitled to indemnity against the covenants in the leases which he was thus declared to hold as trustee; that an inquiry ought to be made as to alleged improvements and as to alleged waste; and that he was entitled to be allowed the benefits of those improvements; and that, being a *bonâ fide* purchaser, without misconduct, he ought not to be charged with costs.—*Id. ib.*

REPRESENTATION. See MORTGAGE.

RESIDUE.

1. A testator devised "all my estate, both real and personal, to E. E., his executors, administrators, and assigns, to and for the several uses, intents, and purposes following, that is to say"; and then, after specifying various objects of his bounty, appointed "the said E. E. executor of this my last
- \* 930 \* will and testament." The trusts of the will did not exhaust the estate: — *Held*, affirming a decree of Lord Chancellor Cottenham, that E. E. did not become entitled to the residuary personal estate for his own benefit, but was a trustee thereof for the widow and next of kin of the testator, according to the Statute of Distributions.

*Dawson v. Clark*, 18 Ves. 247, affirmed. — *Elcock v. Mapp*, 492.

2. The rule in such case is, that where there appears a "plain implication or strong presumption" that the testator by naming an executor meant only to give the office of executor, and not the beneficial interest, the person named shall be considered a trustee for the next of kin of the undisposed surplus. — *Id. ib.* See 509, note.

RIGHT, PETITION OF. See PETITION OF RIGHT.

SALE. See NOTICE, TRUSTS, and TRUSTEES.

SETTLEMENT TO USES. See REGISTRATION.

If a man has a limited interest in a term, and settles it to a certain use, and then substitutes a new and extended term for it, he cannot by so doing avoid the previous settlement. — *Mill v. Hill*, 828.

SPECIALTY CREDITORS. See MORTGAGE.

C. and Co. were legal mortgagees and special creditors for a sum of 30,000*l.* on Y.'s estate. Certain official persons acting as trustees for the Crown paid off this debt, and received an assignment of the mortgage, and of a covenant therein contained, with liberty to sue upon it in trust for the Crown: — *Held*, that the Crown thereby became legal mortgagee and specialty creditor for the 30,000*l.* originally due to C. and Co. — *Attorney-General v. Cox*, 240.

Where a lease contains a covenant for the payment of rent, and the lease is surrendered, the personal covenant is independent of the estate in the property; and, so far as relates to rent previously due, is not affected by the surrender, but the lessor remains a specialty creditor for the rent which accrued due before the surrender. — *Id. ib.*

STATUTE. See PETITION OF RIGHT.

8 & 9 Vict. c. 17, §§ 9 & 29. Companies Clauses' Consolidation Act for Scotland, 1.

55 Geo. III. c. 42, § 7. Bill of Exceptions (Scotland), 25.

28 Hen. VIII. c. 11, § 3. Tithes and First-fruits, 72.

5 & 6 Wm. IV. c. 30. Ecclesiastical Profits, 72.

6 & 7 Wm. IV. c. 67. Ecclesiastical Appointments' Suspension, 74.

\* 931 \* 1 & 2 Vict. c. 108. Ecclesiastical Appointments' Suspension, 75.

3 & 4 Vict. c. 113. Ecclesiastical Duties and Revenues, 75.

7 & 8 Vict. c. 110. Joint Stock Companies' Registration, &c., 161, 341.

11 & 12 Vict. c. 45; 12 & 13 Vict. c. 108. Joint Stock Companies' Wind-up Acts of 1848 and 1849, 163, 341.

- 6 Geo. IV. c. 120, § 5. Scotch Judicature Act, 280.  
 48 Geo. III. c. 151. Scotch Judicature and Appeals, 282.  
 6 & 7 Vict. c. 96. Libel, 395.  
 3 & 4 Vict. c. 108. Municipal Corporations (Ireland), 395.  
 3 & 4 Wm. IV. c. 91. Irish Jury Act, 395.  
 6 & 7 Wm. IV. c. 96. Parochial Assessment Act, 418.  
 59 Geo. III. c. 39. (St. Pancras Local Act), 419.  
 59 Geo. III. c. 31. Claims of British Subjects on France, 452.  
 37 Hen. VIII. c. 12. London Tithes, 470.  
 2 & 3 Vict. c. 95. Blackwall Railway, 470.  
 6 & 7 Wm. IV. c. 71. Tithe Commutation Act, 479.  
 11 Geo. IV. & 1 Wm. IV. c. 40. Testator and Residue, 509, n.  
 10 & 11 Vict. c. 96. Trustee Act, 607.  
 54 Geo. III. c. 68. Ecclesiastical Courts in Ireland, 639.  
 53 Geo. III. c. 24. Vice-Chancellor, 759.  
 33 Geo. III. c. 80. Grand Junction Canal Act, 759, 794.  
 5 Wm. IV. c. 34. Birmingham Canal Navigation, 812.  
 6 Anne, c. 2. Irish Registration Act, 828.  
 8 & 9 Vict. c. 119. Midland Great Western Railway Company of Ireland, 872.  
 9 & 10 Vict. c. 224. Midland Great Western Railway of Ireland, — Mullingar to Athlone, 872.

In construing an ordinary Act of Parliament, every word must be understood according to its legal meaning, unless the context shows that the legislature has used it in a popular or more enlarged sense: but in a penal enactment, where it is sought to depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood in a larger or more popular sense must plainly appear. — *Stephenson v. Higginson*, 638.

STATUTE OF DISTRIBUTIONS. See RESIDUE.

SURETY. See PRINCIPAL AND SURETY.

SURRENDER. See LEASE.

TITHES.

By the Statute 37 Hen. VIII. c. 12, the inhabitants of certain parishes in the city of London, therein mentioned, are to pay tithes at the rate of 2s. 9d. in the pound on their rent. By the 2 & 3 Vict. c. 95 (the Blackwall Railway Act), \* where houses in any of these parishes \* 932 (of which St. Olave's, Hart Street, is one) shall be taken for the purposes of the railway after the occupiers shall have quitted their houses, and "until new houses or other buildings shall be erected, and occupied, of such annual rent or value, that the tithes of such new houses shall be equal to the tithes payable for the houses quitted, the tithes, or payments in lieu of tithes, payable in respect of the houses quitted (according to the last assessments thereof to the 25th March, 1839), or annual sums of money equal to the loss in tithes which the rectors may sustain by the taking down of such houses, shall be paid and payable to the said rectors," &c. The company removed a great many houses, and built two others, which were at once occupied: — *Held* (reversing a decree of Vice-Chan-



cellor Wigram), that the object of the Act was only indemnity to the clergy; that therefore the clergy were entitled to receive only what they would have received if the railway company had never interfered with the premises; that the company was liable to pay in respect of houses removed (where no others had been built in their places) such sums as were actually paid to the rector, whether by agreement or otherwise, up to the 25th of March, 1839; that the amount actually agreed upon between the rector and the occupant, and paid by the occupant, constituted the "assessment" within the meaning of the Act, and that the amount of compensation must be measured thereby; and further, that, where new houses had been built and occupied, the company was entitled to be credited (in reduction of its general liability to make compensation under the Act) with the sums which had become payable in respect of such new houses, and not merely with those which had been actually received therefrom. — *Blackwall Railway Company v. Letts*, 470.

**TOWN COUNCILLOR.** See **JURYMAN.**

A town councillor is, by the 3 & 4 Vict. c. 108, disqualified from being a special jurymen. The name of a town councillor stood on a special jury-list after it had been reduced: — *Held*, that under the Irish Jury Act, 3 & 4 Wm. IV. c. 91, he was liable to challenge for this disqualification when about to be sworn. — *Barrett v. Long*, 395.

**TRUSTEES, AND TRUSTEE ACT.** See **REGISTRATION ACTS**, 3, 4; **RESIDUE**, 2.

\*983 1. A debtor assigned his house and business in trust for payment of his debts, retaining to himself the management of the business, under the superintendence of the trustees, who, on his failing to perform his covenants in the trust deed, were thereby empowered, after having given him three months' notice, to sell the house and business. Such notice was given, but waived by consent of the creditors and trustees, assembled at a general meeting: — *Held*, that a sale afterwards made by the trustees, without further notice, was unauthorised and unlawful. — *Tommey v. White*, 49.

2. Where trustees are directed to pay a certain sum to a person for life, and are empowered, according to their discretion, to invest the trust funds out of which that sum is to arise, but decline or neglect to act, and the assistance of a Court of Equity is sought in order to carry into effect the purposes of the will, the Court will not, as a matter of course, exercise that discretion, but will only act on its established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding. — *Prendergast v. Prendergast*, 195.

3. The costs of the appeal were ordered to come out of the estate, but the trustee having unnecessarily printed certain documents for the hearing of the appeal, the costs of such printing were disallowed. — *Id. ib.*

4. If a trustee has a power or a trust to sell property, he must *bonâ fide* have some one to deal with in the sale of it. — *Lewis v. Hillman*, 607.

5. If an attorney or agent can show he is entitled to purchase property, notwithstanding his character of attorney or agent, yet if, instead of openly purchasing it, he purchases it in the name of a third person,

as his trustee or agent, without disclosing the fact, such purchase is void. — *Id. ib.*

6. Under the Act 10 & 11 Vict. c. 96, it is entirely a matter for the discretion of the Court to direct a bill to be filed for the purpose of more solemnly considering a question raised on a proceeding by petition taken under that Act. — *Id. ib.*

7. On a petition presented under that Act, praying for the payment out of Court of money then in Court, and on cross petition in opposition thereto, the Court has full power to declare the validity or invalidity of any deed on which the claim to that money is vested. — *Id. ib.*

*Quære.* Whether this may not properly be done upon petition alone, without any necessity for filing a cross petition? Such \*necessity, \*934 if it exists, may be dispensed with by consent. — *Id. ib.*

8. A. was entitled to a reversionary interest in one-fifth share of certain real and personal estate then held by a devisee for life. A. granted to B. an annuity upon it; the annuity deed, which was registered, contained a power of sale; the annuity fell into arrear, and B. determined to exercise the power of sale. The sale was effected for a sum of 900*l.*; but the purchaser discovered an objection in the memorial registered, which rendered the annuity deed invalid, and he refused to complete the purchase, and obtained a return of his deposit money. The solicitors of B. (acting at the time, as they stated, from motives of kindness to A.) obtained from A., who had not the benefit of any solicitor's advice, an assignment of the reversionary interest to L. for the sum of 900*l.*, and after the reversion fell in by the death of the tenant for life, claimed the property as the purchasers', alleging that the purchase had been made by L. as their agent and on their behalf. The executors declined to pay them the value of the property, which it was then found amounted to 1770*l.*, but paid it into Court under the 10 & 11 Vict. c. 96 (the Trustee Act). The solicitors presented a petition to have the money paid out to them as purchasers of the reversionary interest under the deed of assignment to L. A. opposed the payment, on affidavits, which set up a case of deception and fraud practised on him. The parties on both sides agreed that the case should be heard on petition and affidavits as if a petition and cross petition had been filed. The Vice-Chancellor ordered the money to be paid out of Court to the solicitors as purchasers. The Lord Chancellor, on appeal, reversed this order, declared the assignment to be invalid, and ordered the money to be paid back into Court; reserved the costs, and gave either of the parties liberty to make any further application to the Court:—*Held*, that the Lord Chancellor's order was correct; that the purchase by the solicitors, who were at the time the solicitors of the vendor, was contrary to the rules of equity, and void; that it was in the discretion of the Court to order a bill to be filed; that without any consent the Court had jurisdiction, on petition and cross petition, under the statute, to declare the deed of assignment invalid, as well as to order repayment of the money; that the consent here given waived any possible necessity for a cross petition; and that the \*order \*935

was not bad for not directing a return to the solicitors of the money they had paid as purchase money; for that the leave reserved to either party to make any further application to the Court enabled them to obtain a return of this money. — *Id. ib.*

9. An Act of Parliament incorporated certain persons as a company for the purpose of making a canal, and gave them powers to purchase and hold lands for the purposes of the Act; it authorised persons to "contract for, sell, and convey their lands"; gave a form of conveyance "of all the estate, right, title, and interest" of the person conveying; and enacted that all such contracts, agreements, sales, conveyances, and assurances should be valid to all intents, &c. S. was a tenant of a copyhold land, a portion of which was wanted for the purposes of the canal; he sold it to the company, and executed a conveyance according to the form given by the Act. The land was then applied to the purposes of the canal. On the death of S. the lord made a proclamation for the heir of S. to come in and be admitted as a tenant on the rolls of the manor. No one appeared to claim admittance, and the lord seized the land *quousque*. He afterwards brought ejectment against the canal proprietors, and obtained judgment against them, on the ground that the conveyance under the Canal Act had only vested in them an equitable estate in the copyhold land. He then interfered to stop the course of the navigation. The canal proprietors filed a bill against him, praying that the customary heir of S., or such other person as the plaintiffs might appoint, might be admitted to the copyhold premises, the plaintiffs undertaking to pay the fine and fees upon such admission; and further praying for a perpetual injunction and general relief. The Vice-Chancellor made a decree directing that the customary heir of S. (who had been made a party to the suit) should be admitted tenant to the copyhold premises in question, and when admitted should hold the same as trustee for the plaintiffs in the suit; and the amount of the fine was referred to the Master, and an injunction was granted as prayed:— *Held*, that the decree of the Vice-Chancellor was right. — *Dimes v. The Grand Junction Canal Company*, 794.

#### VENDOR AND PURCHASER.

- \* 936 1. A mortgagor represented to an intending purchaser that the estate was only liable to a mortgage for 20,000*l.* to G. and \* Co., an additional sum of 10,000*l.* due to them being secured on the mortgagor's personal property. The whole sum had in fact been originally secured on the land, and G. and Co. denied that they had ever done any thing to part from their security on the land. After the death of the mortgagor, G. and Co. filed a bill of foreclosure, and obtained from the purchaser the whole 30,000*l.*: — *Held*, that as between the purchaser and the executors of the mortgagor, the representations made by the mortgagor to the intended purchaser were equivalent to a contract with him, and the personal property of the mortgagor was liable to the extent of the 10,000*l.* — *Attorney-General v. Cox*, 240.
2. It is not a rule of equity, that upon the purchase of property subject to encumbrances for its full value, the vendor is bound to apply the purchase

money in payment of the encumbrances according to their priorities. Such a duty can only be the result of express or implied contract. — *Id. ib.*

3. It is a general rule of equity, that if a purchaser is in possession of an estate, receiving the rents, he is liable to pay the purchase money, and that the purchase money being retained by him will carry interest to be paid by him to the seller. An agreement, which appears to prevent the application of this rule, will be examined in a Court of Equity, by its aid, and will or will not be enforced, according to circumstances. — *Birch v. Joy*, 565.
4. B., in March, 1812, contracted for the purchase of an estate from C., for 90,000*l.* The estate was very much encumbered, and C. was to make a title free from all encumbrances, except one mortgage of 12,000*l.* B., on being put into possession of part of the estates, was to pay 16,000*l.* on the 24th of June, 1812, "and a further sum of 4000*l.* at Michaelmas next, on C. putting B. into the actual possession of the remainder, free from all encumbrances, except the mortgage for 12,000*l.*; the further sum of 25,000*l.* in March, 1813; 16,500*l.* in March, 1816; and 16,500*l.* in March, 1818." B. was to grant C. a mortgage of all the estates for securing these three sums at the respective times aforesaid, "with legal interest from Michaelmas next." The 20,000*l.* thus agreed to be paid in two sums within the first year not having been paid by B., nor any of the encumbrances cleared off by C., a new agreement was entered into in October, 1812. B. was forthwith to advance 10,000*l.* to pay off certain encumbrances, he was to be let into immediate \* possession, to be en- \* 937 titled to the rents and profits "from Michaelmas last," and to be at liberty to cut timber, &c. The conveyances were to be executed as soon as existing difficulties could be removed, and every possible exertion was to be made to that end. It was further agreed, that "the interest of the remainder of the purchase money shall not commence till Lady Day next, in case the title shall be perfected, and the conveyances and other assurances executed at that time, and if not, then to commence on the execution of such assurances." B. was let into possession, but the business was not completed. In a suit by B. for specific performance, an account was directed; and, *Held*, first, that under the clause in the second agreement, exempting "the remainder of the purchase money" from the payment of interest, the sum remaining unpaid of the 20,000*l.*, and the three sums constituting the 58,000*l.*, must be taken to come under that description; secondly, that the exemption of a purchaser in possession of the estate from liability to interest on the purchase money, though permissible if the agreement had been speedily executed, would not be allowed, and would not be enforced by any Court of Equity where that state of things continued for many years; and thirdly, that the second contract must be taken to have failed by circumstances, and that the first contract must be decreed to be executed so far as it had remained unexecuted; and the House ordered the accounts to be settled on these principles. — *Birch v. Joy*, 566.

5. J. was an annuitant on an estate which had been sold to B., subject to the annuity and other encumbrances. J. had also a charge on the purchase money. B. gave notice to put an end to the annuity, and then filed a bill to have it declared that it was at an end, and to have an account taken. The Vice-Chancellor directed the Master to inquire what were the encumbrances, and declared the annuity at an end. The Lord Chancellor affirmed this decree. J. appealed against one part of it to the House, and the decree was reversed; but the cause went on to further litigation on the other point, and a subsequent decree was made. In this decree, which was made on hearing on further directions, the Lord Chancellor introduced alterations and additions to the first decree, as to that part of it which had not been the subject of appeal: — *Held*, that he was at liberty to do so; for that \* the part unappealed against remained as before, and was not rendered final by the decision in this House on the part which was the subject of the appeal. — *Id. ib.*
- \* 938

VESTRY.

1. A rate for the relief of the poor, which is lawfully made in other respects, is not rendered invalid by the circumstance that some of the vestrymen, who concurred in making it, were vestrymen *de facto*, and not *de jure*. — *Scadding v. Lorant*, 418.
  2. When notice of the purpose of a vestry meeting has been duly given, and that meeting has begun but not completed a certain business, and the meeting is regularly adjourned, such business may lawfully be completed at the adjourned meeting, though the notice for summoning such adjourned meeting does not state the purpose for which it was summoned. — *Id. ib.*
- A vestry, duly assembled by notice for that purpose, on the 12th of August, 1889, resolved, "That a rate of one shilling in the pound be made, and the same is hereby made and laid, and is to be collected forthwith." This resolution was signed by the requisite number of vestrymen, but one of the persons so acting was not at that time a vestryman *de jure*. The parish was so large that the estimate of the assessments required by the 6 & 7 Wm. IV. c. 96 (Parochial Assessments Act) could not be prepared and signed at that vestry. It was resolved "that the vestrymen be summoned for the 4th of September, to elect a director of the poor in the place of," &c.; and the vestry then adjourned to the 4th of September. A special meeting of the vestry was held on the 28th of August, when the minutes of the last meeting were read and confirmed, and other business was transacted. On the 4th of September there was a general meeting of the vestrymen pursuant to adjournment from the 12th of August, when the minutes of the last vestry were read and confirmed, and the vestry was occupied with hearing applications from poor parishioners for relief from payment of the poor-rate. This meeting adjourned to the 9th of September. On the 9th of September, another general meeting of the vestry was held, when the minutes of the last vestry were read and confirmed;
- 939 the vestry was occupied as before, and adjourned to \* the 14th. On the 14th of September, the vestrymen again met, having received a sum-

mons ; which, however, did not state the purpose of the intended meeting ; and four volumes, arranged in continuous alphabetical order, like one book, were produced, containing the particulars of the assessment required by the 6 & 7 Wm. IV. c. 96, and the last of these books was duly signed, and the rate, thus completed, was allowed by the justices : — *Held*, that the rate thus made was a valid rate : — *Id. ib.*

In replevin for seizing the plaintiff's goods under a distress for this rate an avowry alleged that a poor rate had been made after the passing of a certain specified local Act, and before the taking of the said goods, and whilst the property of the plaintiff was, and the plaintiff in respect thereof was, liable to be rated, to wit, on the 12th August, 1839 : — *Held*, that this was a good avowry, and was proved by the facts above stated. — *Id. ib.*

#### VICE-CHANCELLOR.

The Vice-Chancellor is, under the 53 Geo. III. c. 24, a Judge subordinate to, but not dependent on, the Lord Chancellor, and, consequently, should the Lord Chancellor be disqualified by interest from adjudicating in any cause, such disqualification will not affect the Vice-Chancellor, but his decree may be made the subject of appeal to this House. — *Dimes v. The Grand Junction Canal Company*, 759.

Before a decree made by the Vice-Chancellor can be appealed against, it is required to be enrolled. The enrolment is the act of the Lord Chancellor : — *Held*, that the act of enrolment, though performed by a Lord Chancellor disqualified by interest from adjudicating in the cause, was not affected by his disqualification, but was valid for the purpose of bringing up the appeal to this House. — *Id. ib.*

#### WATER FOR A CANAL.

A canal, formed under a private Act of Parliament, had three levels, of which A was the highest, B the middle, and C the lowest level. The canal proprietors (though without authority under their Act to do so) erected engines between the C level and the plaintiff's mill-forge, and pumped back the water, which, after serving the purposes of navigation in levels A and B, had flowed into level C. In 1826, a new \* Act repealed \* 940 ing former Acts, and re-enacting their provisions, with certain alterations and additions, was passed. The 15th section gave the canal proprietors authority to maintain engines, &c. for supplying the canal with water, and for that purpose to have reservoirs and feeders supplied from all brooks, streams, &c. from which they were lawfully supplied before the passing of the Act, and " from time to time to raise the water of the canals from one level to another, or to any reservoirs ; and for any of the purposes aforesaid to use such engines as they shall judge proper, making full satisfaction for all damages to be sustained by the owners of any mills, forges, brooks, streams, &c. taken, used, removed, diverted, or injured " in execution of the powers of the Act. By the 80th section, the canal proprietors were forbidden to take for the use of the canal any water out of the river above the plaintiff's forge, and they were directed to maintain flood-weirs, so that all waste water running into level C, not required for

the purposes of the canal, should flow into the river above the plaintiff's forge. The proprietors pumped up, as before, the water out of level C back into the level A, in consequence of which, except on extraordinary occasions, no water escaped over the weirs into the river: — *Held*, that they were entitled to do so, and that such pumping back of the water from one level of the canal to the other did not give the plaintiff a right to compensation under the Act. — *Elwell v. The Birmingham Canal Company*, 812.

**WILL.** See PRACTICE, 6, 7, 8.

A devise of lands in trust for J. B., a reputed son, for his life, and, after his decease, for and to his first and every other son successively in tail male, and in default of such issue to his daughter or daughters, to hold to them, if more than one, and their heirs, as tenants in common; and, in default of issue of the said J. B., to and for the testator's heirs: — *Held*, that J. B. took only an estate for life, and that no remainder in tail to him could be implied after the limitation to the daughters. — *Baker v. Tucker*, 106.

A testator, after making certain specific bequests, proceeded as follows: "I give and bequeath to my trustees hereinafter named, so much of my personal estate and effects as, at the time of my decease, shall produce the  
 \* 941 clear annual \* income of 1500*l.*; and I direct that the same shall be selected and appropriated and set apart as soon as may be, &c. by my said trustees, in their uncontrolled discretion, upon trust to pay" to his wife the dividends during her life or widowhood, and after her death or second marriage, the same was to become part of his residuary personal estate. He directed that if the annual produce so appropriated should be increased or reduced in amount, his wife was to receive the increased or reduced dividends, as the case might be, in lieu of those before directed to be paid to her. The trustees were fully empowered at their discretion to permit the personal estate to continue on the same securities as at the time of his decease, or to sell and reinvest, as the testator himself might do. Some of the foreign funds ceased to pay any dividends, and the trustees refused to exercise their discretion as to altering the investments, but submitted to act as the Court should direct. The Court refused to exercise the discretion vested in the trustees, but acting on its general rule in such matters, as the testator had not expressed a different intention, directed the annuity to be raised by the purchase of an adequate sum in consols, and ordered the Master to inquire, having regard to the interests of other parties under the will, what investments must be called in to effect this object: — *Held*, that the decree thus made was correct. — *Prendergast v. Prendergast*, 195.

A testator made a will in the following form: "Whereas I am seised in fee simple of divers freehold manors, or reputed manors, messuages, lands, tenements, rents, and hereditaments, situate, &c., and of a leasehold estate in, &c., and also of a copyhold estate, situate, &c., and also of freehold estates in, &c., and of large sums in the funds of England: Now I do hereby give and devise, after my just debts and funeral expenses and

legacies are paid, which I order to be paid out of my personal estate, all my estates in the funds of England and all my said manors, &c.," unto three persons in succession, and their sons successively in tail male, in strict settlement; "and for default of such issue, I give and devise the same to my own right heirs for ever." He then gave his trustees a power, with the consent of the person who might be in possession, to lay out his personal estate in the purchase of freeholds, &c., and to settle the same when purchased to such uses as were declared of his "manors, or reputed manors, messuages, \* lands, tenements, rents, hereditaments, and prem-\*942 ises devised by this my will, as shall be then existing undetermined, or capable of taking effect, &c. to &c. for no other estate, use, trust, or purpose whatsoever":—*Held*, first, that the power to trustees to convert personalty into realty did not operate as an absolute conversion; but, secondly, that, on the face of the will, it was the intention of the testator to make the two funds a blended property, and to give them the character of real estate, and to make both properties go together, and to give both to persons expressly designated; and that such intention did not cease with the failure of issue male under the limitations, so as to make the real estate afterwards go in one way, and the personal estate in another.—*De Beauvoir v. De Beauvoir*, 524.

#### WINDING-UP ACTS.

1. The 7 & 8 Vict. c. 110, does not create any new liability in an allottee of shares, beyond what his own contract imports. — *Hutton v. Thompson*, 161. *Norris v. Cooper*, 161.
  2. A. wrote a letter of application for shares in a railway company which was provisionally registered, and received answer in the usual form, declaring that certain shares had been allotted to him, on which he was required to pay a deposit. A. paid the required deposit, but neither signed the subscribers' agreement nor the parliamentary contract. The scheme was abandoned: — *Held*, that A. did not, by his letter of application for shares and by paying the deposits thereon, become a "member" of the company, or a "contributory," within the meaning of the Joint Stock Companies' Winding-up Acts. He merely bound himself to take such shares as he had applied for, should the company ever in fact be established. — *Id. ib.*
  3. *Held*, therefore, that his name had been improperly put by the Master among the list of contributories, and that the Court below had rightly ordered it to be expunged from the list. — *Id. ib.*
- A projected railway company, provisionally registered, is within the meaning of the Winding-up Acts, which may therefore be applied to it, if a Court of Equity shall so think fit. — *Bright v. Hutton*, 341.

The liability of a person as a contributory under the Winding-up \* Acts \*943 is not a question of law, but of fact. The test of his liability in equity is his liability at law. — *Id. ib.*

Contributories are those only who have contracted, by themselves or agents, with a creditor, or who have agreed to indemnify or repay, in part or in all, those who have contracted with the creditor on their own account. — *Id. ib.*



A. was a member of the provisional committee of a projected railway company, which had been previously registered, and the affairs of which were put under the authority of a managing committee. He accepted shares, and paid a deposit on them; but did no further act. The scheme was abandoned: — *Held*, that on these facts he was not liable to a creditor for business done under the orders of the managing committee towards completing the project and converting the association into a regular company, and consequently he was not liable as a contributory under the Winding-up Acts. — *Id. ib.*

END OF VOL. III.









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